89-1716

No. _____

In The

Supreme Court of the United States

October Term, 1989

PUEBLO OF SANTO DOMINGO,

Petitioner,

v.

ARNOLD J. RAEL, SOPHIA V. RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY C. RAEL, and JERRY C. RAEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. *Indispensable Party.*

A. Is the United States an indispensable party under Rule 19, Fed. R. Civ. P., to a simple ejectment suit brought by an Indian tribe to assert a prior land grant title against holders of homestead patents?

B. Does the fact that one inactive claim under the Indian Claims Commission Act is subject to an unauthorized stipulation of extinguishment of *aboriginal title*, justify the court of appeals in ordering a second suit in ejectment over an independent *fee-simple* land grant title held in abeyance indefinitely, possibly for years?

II. *Summary Judgment.*

A. Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), is the moving party's initial burden of production satisfied, and does Rule 56, Fed. R. Civ. P., mandate entry of summary judgment against a nonmoving party having the burden of proof, where the nonmoving party makes no evidentiary showing, where there is full agreement as to the material facts among the expert witnesses for both sides, and where the nonmoving party has formally admitted and not challenged key material facts?

B. Where the district court granted partial summary judgment on five issues under Rule 56(d), Fed. R. Civ. P., and the nonmoving party failed to dispute the material facts as to four of the issues, did the court of appeals err in reversing the district court on all five issues?

III. *Burden of Proof.*

A. Under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), does the statute assigning the burden of proof in disputes over Indian land, 25 U.S.C. § 194, fail to apply to issues of property boundaries?

B. Under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), and 25 U.S.C. § 194, does the burden of proof shift to the non-Indian once there is a prima facie showing either of prior tribal possession of or title to the area in dispute, or do *Wilson* and Section 194 first require a prima facie case as to each separate issue presented in litigation over title to purported Indian land?

LIST OF PARTIES

The names of all parties to this action are included in the caption.

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LEGISLATIVE MATERIALS

Petitioner, the Pueblo of Santo Domingo, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered July 20, 1989.

OPINIONS BELOW

The August 16, 1984, opinion and order of the United States District Court for the District of New Mexico granting partial judgment on the pleadings in favor of the Pueblo of Santo Domingo, and holding that the United States is not an indispensable party to this action is set forth at App. E. The July 10, 1985, opinion and order of the district court, which denied the Rael's motion to dismiss, and once more held that the United States is not an indispensable party, is set forth at App. D. On May 16, 1986, the district court granted partial summary judgment in favor of the Pueblo on various issues as to the validity of the Diego Gallegos land grant and the Pueblo's claim of title thereto. That opinion and order is set forth at App. C. The district court's August 8, 1986, instruction on the burden of proof under 25 U.S.C. §194 is set forth at App. H. The order and judgment of the United States Court of Appeals for the Tenth Circuit, dated July 20, 1989, is set forth at App. B. None of the opinions or orders of the district court or the court of appeals is reported.

JURISDICTION OF THIS COURT

The order and judgment to be reviewed was entered on July 20, 1989. The Pueblo's petition for rehearing and suggestion for rehearing en banc was denied on January 3, 1990. [App. A]. On March 19, 1990, Justice White granted an extension of time within which to file the petition for a writ of certiorari until May 3, 1990. Jurisdiction is conferred by 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATUTES

The following statute is involved in the appeal:

25 U.S.C. §194. Trial of right of property; burden of proof.

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

This is an ejectment case about who has the better right of possession to three tracts of land in New Mexico. The Pueblo of Santo Domingo asserts title based upon an unconfirmed Spanish land grant. The defendants claim title based upon homestead patents issued in the 1930's and 1940's.

In 1983, counsel herein located, in the Records of the United States Surveyor General of New Mexico, Spanish documents detailing a 1730 Spanish land grant to one Diego Gallegos by New Mexico Governor Juan Domingo de Bustamante, and a formally executed 1748 sale by Gallegos's widow and children to the Pueblo of Santo Domingo. Further searches uncovered other Spanish documents, translations, and certified copies of the deed and grant documents. Counsel also found references to the grant in the records of adjoining land grants. The documents presented a compelling story of an Indian-owned land grant title long neglected by United States authorities, but repeatedly recognized and continuously protected by Spanish authorities.

The Pueblo retained an eminent New Mexico historian, Dr. Myra Ellen Jenkins, to research the entire history of the grant and to prepare a report on her findings.[1] She also prepared translations of the basic Spanish documents. [App.

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[1] Dr. Jenkins, in charge of the archives division of the New Mexico Records Center and Archives from 1960 to 1980, organized all of the Spanish and Mexican records. She served as State Historian of New Mexico from 1969 to 1980, is a widely known expert on Spanish and Mexican land grants, and is highly regarded for her work on the history of Pueblo lands and land grants under Spain and Mexico. She is also an expert in Spanish translations and paleography, and has studied in depth most Spanish land grants in New Mexico. [App. 51-52].

59-76]. Dr. Jenkins concluded that the Diego Gallegos grant was a valid Spanish land grant, that the 1748 sale to Santo Domingo was bona fide, that subsequently the Spanish authorities formally investigated the grant and afforded it protection from claims by non-Indians, that nothing was ever done to divest Santo Domingo of the title, and that United States officials simply ignored Santo Domingo's title and filed away the documents. [App. 53-55].

Because the north boundary of the Gallegos grant contains Santo Domingo's single most important religious site [App. 80-82], and because the Pueblo was engaged in a controversy with the respondents herein over disposition of vacant land immediately below the site, the Pueblo filed suit on December 21, 1983, against seven members of a Silc, New Mexico family (the Raels) to vindicate its prior title to the 1,280 acres claimed by the family. Jurisdiction in the district court was conferred by 28 U.S.C. §1331 and 28 U.S.C. §1362. The original complaint also raised a separate claim based upon aboriginal title, but that claim was dismissed voluntarily at trial.

On August 16, 1984, the district court granted the Pueblo's motion for partial judgment on the pleadings and dismissed the Raels' affirmative defense that the United States is an indispensable party to this action. On July 10, 1985, the district court denied the Raels' subsequent motion to dismiss based upon the indispensability of the United States. On October 11, 1985, the Pueblo filed a motion for summary judgment on its second claim, the superiority of its title under the Gallegos land grant. [Doc. 104; App. 48-50].

In support of that motion, the Pueblo offered copies of several Spanish documents from official archives, including certified Spanish copies of the grant documents together with the original deed, with translations. [App. 59-76]. It further introduced several affidavits: by its historian, by an anthropologist of the Pueblo Indians, by an archaeologist, by a federal surveyor with the Bureau of Indian Affairs, and by a realty officer with the Bureau of Indian Affairs. [App. J, K, L, M]. The Pueblo also offered five expert reports, maps of the Gallegos grant, and several American period documents.

[Doc. 104, 10/11/85, Appendix to Motion for Summary Judgment]. This comprehensive submission documented the history of the grant, its boundaries, and centuries of use by the Pueblo.

The Pueblo then deposed the Raels' two witnesses: Dr. John Baxter, a Spanish colonial historian, and Stewart Peckham, an anthropologist. Significantly, Dr. Baxter completely agreed with Dr. Jenkins's conclusions about the Gallegos grant prior to American sovereignty. [App. 94-108]. He agreed that all of the documents were authentic, that the grant was valid, that the Pueblo purchased it in 1748, and that Spanish authorities repeatedly recognized and protected the Pueblo's title. He also concurred in Dr. Jenkins's translations and interpretations of the Spanish documents. For that reason, the Pueblo filed the Baxter deposition in support of its motion.[2] Mr. Peckham likewise had no quarrel with the expert reports and affidavits.

In response to the Pueblo's motion, the Raels merely filed the entire depositions of some of the Pueblo's experts, together with the deposition of the Raels' anthropologist, Mr. Peckham, and the Raels' answers to interrogatories and requests for admission. The latter were merely denials of any relevant knowledge, except that in reliance upon their historian, the Raels admitted the making of the Gallegos grant and the execution of the deed to Santo Domingo. [App. 17]. More than six months after the filing of the Pueblo's motion, the Raels submitted an affidavit by Dr. Baxter arguing the possibility that Congress had silently confirmed the Gallegos grant when it confirmed the Santo Domingo grant in 1858. The Pueblo responded that such an extraordinary prospect was foreclosed by the fact that the act of Congress confirming the latter grant identified the grant acted upon.[3]

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[2] Dr. Baxter also prepared a report for the Raels, which was an exhibit to his deposition. That report conceded the making of the Gallegos grant, its purchase by Santo Domingo, and subsequent Spanish protection of the Pueblo's title. (Doc. 120, 11/14/85, Exh.1).

[3] The statute referenced a report of the Surveyor General of New Mexico, which report contained Spanish transcriptions and English

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On May 16, 1986, the district court granted partial summary judgment to the Pueblo. [App. C]. The court found the following facts to be without substantial controversy [App. 26-27]:

1. In 1730 the Spanish governor, with full authority, made a land grant to Diego Gallegos.
2. Santo Domingo purchased the grant from Gallegos's widow in 1748.
3. Spanish officials subsequently recognized Santo Domingo's ownership of the grant, and Santo Domingo neither sold nor was divested of the grant prior to the Treaty of Guadalupe Hidalgo.
4. No actions or failures to act since the Treaty of Guadalupe Hidalgo have divested the Pueblo of title to the grant or precluded it from claiming title.
5. The Raels' claims of title are based upon homestead patents issued in the 1930's and 1940's.

From these facts, the court concluded that the Pueblo "has good title under the Diego Gallegos Grant." [App. 25].

The district court declined, however, to grant summary judgment on the issue of whether the disputed tracts lay within the Gallegos grant. [App. 25]. On August 5-8, 1986, a jury trial was held on that issue.[4] The Pueblo's experts as well

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translations of the particular grants recommended for confirmation. The land grant submitted for confirmation on behalf of Santo Domingo was a 1689 grant by Governor don Domingo Jironza Petriz de Cruzate. This report was appended to the Pueblo's reply brief in support of its motion for summary judgment. [Doc. 124, 11/24/85].

[4] The Raels' experts testified again that they took no issue with the conclusions of the Pueblo's experts on the validity of the Gallegos grant, its purchase and ownership by Santo Domingo, and its recognition by Spanish authorities as a valid title. Neither did they dispute that the grant's boundaries were as claimed by the Pueblo and its experts. [App. O, P]. In fact, Dr. Baxter testified that the asserted boundaries were reasonable and consistent with the documents. [App. 113-16, 119-24].

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as several tribal members testified, and the Pueblo introduced several maps, photographs, and other documents, in addition to its expert reports.[5] The court instructed the jury that the Raels had the burden of proof under 25 U.S.C. §194 to establish by a preponderance of the evidence that the disputed land did not lie inside the boundaries of the Gallegos grant.[6] After only four hours, the jury found for the Pueblo. [App. 43]. On September 4, 1986, the district court entered judgment for the Pueblo ejecting the Raels from the three subject tracts. [App. 41-42].

The Raels filed a timely notice of appeal on September 25, 1986. On July 20, 1989, the court of appeals filed its order and judgment. The court of appeals found the United States to be indispensable, ruled that partial summary judgment had been improperly granted, and held that the jury instruction on the burden of proof erroneously placed the burden on the Raels. Consequently, it vacated the judgment and ordered the case remanded to be held indefinitely until the conclusion of an unrelated case in the United States Claims Court.

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Neither one could offer more supportable boundaries, nor could the Raels offer alternative sites for the boundary calls. In fact, not a single witness at trial disputed the location of the grant's boundaries. The Raels' case depended entirely on impeachment of the Pueblo's evidence and witnesses.

[5] [*See*, Doc. 152, 7/23/86, Plaintiff's Amended List of Exhibits. All were admitted, Tr. Trans. 8/5/86 at 4]. At the close of the Pueblo's case, the Raels moved for a directed verdict, which was denied. [Tr. Trans. 8/7/86 at 121-22]. The Raels failed to renew their motion at the close of trial, thus waiving the contention that the Pueblo had failed to establish a prima facie case. *Fleming v. Lawson*, 240 F.2d 119, 120-21 (10th Cir. 1956).

[6] On July 8, 1985, the district court had heard extensive testimony on prior possession of the disputed area by the Pueblo and the Raels. Uncontroverted conclusions by anthropologist Dr. Florence Hawley Ellis demonstrated that the Pueblo intensively used and occupied the area for centuries, up into this century. This testimony alone, a year prior to trial, established prior possession of the area by the Pueblo. [Hrg. Trans. 7/8/86 at 114-23; Pl. Exh. 19].

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is extraordinary. It gives relief to neither side and leaves a disputed title, after six years of costly litigation, up in the air, clouded, for an indeterminate period of time.[7] The court's holding on indispensability is incongruous. It utterly ignores Rule 19, Fed.R.Civ.P., and conflicts not only with decisions of this Court and other circuit courts of appeals, but also with precedents from the Tenth Circuit itself. The court's complete unravelling of a partial summary judgment supported by a consensus among the experts for both sides and the admissions of the nonmoving parties who had the burden of proof is inconsistent with Rule 56, Fed.R.Civ.P., and this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Finally, the holding that 25 U.S.C. §194 does not apply to boundary location issues, a wayward pronouncement without support in history or precedent, is refuted by *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). Although the form of this case is a run-of-the-mill possessory action, it implicates important issues of public land law, federal civil procedure, and federal Indian law. The court of appeals has in each of these areas departed so greatly from this Court's decisions and the decisions of other circuit courts of appeals that the Court's power of supervision is required.

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[7] There was no oral argument of the case, the decision is unreported, and the court specifically ordered that the decision should not be cited and should have no precedential value. [App. 3]. In short, the court set up an anomalous rule for a single case, denying a Pueblo Indian tribe under federal trusteeship its right to the rule of law. Moreover, the opinion contains blatant errors that betray perfunctory consideration by the panel. *See, infra* at 14, 22.

I. The Holding That The United States Is An Indispensable Party In An Ejectment Action Against Private Parties Conflicts With Applicable Decisions Of This Court, With Decisions Of Other Courts Of Appeals, And With The Tenth Circuit's Own Precedents. The HOLDING IS SO ERRANT That This Court's Power Of Supervision Is Called For.

The essence of an action in ejectment is "to settle title between the adverse claimant and the party in possession." *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), *reh. denied*, 466 U.S. 954. *See also, Taylor v. Anderson*, 234 U.S. 74 (1914). The district court twice held that the United States was not indispensable under Rule 19, Fed. R.Civ.P., and proceeded through trial to judgment. It is undisputed that no one not a party to this case is concluded by it, that complete relief was afforded among the parties by the district court, and that no party is subject to inconsistent obligations.

Actions of this character are sanctioned by myriad precedents. An action very similar to this was twice brought before this Court, which twice held in favor of a party claiming under an unconfirmed Spanish land grant against homestead patentees. *Ainsa v. N.M. & Ariz. R. Co.*, 175 U.S. 76, 90 (1899) (an unconfirmed Spanish land grant "may be asserted, as against any adverse private claimant, in the ordinary courts of justice"); *Richardson v. Ainsa*, 218 U.S. 289 (1910). Decisions are legion that one claiming a superior title to a tract of land can challenge a patent in an ejectment action against the patentee or his successors. *See, Doolan v. Carr*, 125 U.S. 618 (1887), and cases discussed therein; *Wright v. Roseberry*, 121 U.S. 488 (1887); *United States v. Conway*, 175 U.S. 60, 70-71 (1899). In none of these cases was the United States found to be a necessary party, even though it had issued the challenged patents. Rule 19 did not change the existing practice of the federal courts. 3A *Moore's Federal Practice* ¶19.01-1[1].

Notwithstanding this clarity of precedent, the court of appeals found the United States to be indispensable. Amazingly, the court totally ignored Rule 19 with the cavalier remark that

> This obviously is not the circumstance to which the typical indispensable party doctrine is applied; however, this unusual situation demands the same solution or remedy.

[App. 10-11].[8]

The panel's treatment of this issue conflicts egregiously with this Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). As in this case, there the court of appeals had disregarded Rule 19's terms and reversed, after trial, a district court decision that a party was not indispensable. This Court condemned "the inflexible approach" of the court of appeals and held that Rule 19 commands that a finding of indispensability be based upon stated analysis in accordance with the terms of the Rule. It was likewise patent error for the court of appeals herein to disregard Rule 19.[9]

Strangely, the court failed to explain why the United States was even a necessary party under Rule 19(a), let alone an indispensable party under Rule 19(b). The court did not base its holding on protecting the interests of the absent party, the United States, nor did it even discuss such interests. Instead, the finding of indispensability was solely for the benefit of persons already parties to the proceeding, and not for any reason given in Rule 19. The single effect of finding the United States to be indispensable was to give the Raels "a windfall escape" from defeat on the merits.[10] *Id.* at 112.

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[8] The remedy applied, however, was not the same remedy allowed by Rule 19(b), which is dismissal. Instead, the court ordered the case remanded and held. [App. 14-15].

[9] The panel violated the Tenth Circuit's own precedent that Rule 19 mandates analysis in accordance with the Rule's provisions in order to find a party indispensable. *Wright v. First National Bank of Altus, Okla.*, 483 F.2d 73, 75 (10th Cir. 1973); *Lear Petroleum Corp. v. Wilson*, 730 F.2d 1363, 1365 (10th Cir. 1984).

[10] The panel failed to give any consideration to the Pueblo's interests and the lack of an adequate remedy elsewhere for the vindication of

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The opinion of the court of appeals also conflicts mightily with the decisions of other circuits. Within the last year, the Seventh Circuit held that the United States is not an indispensable party to a suit over land brought by an Indian tribe against private parties. *Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 304 (7th Cir. 1989). The court's decision engages in precisely the type of analysis the Tenth Circuit ignored, holding, per Judge Posner, that in such litigation,

> none of the considerations listed in the rule and elaborated in *Provident Tradesmens* or other cases provides any support for the district court's determination [of the indispensability of the United States].

Id. at 304. In the court's view a finding that the United States is indispensable because it is the source of title claimed by the non-Indian defendants would be tantamount to requiring that

> every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher . . . but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here the U.S.).

Id.[11] *Contra, Nichols v. Rysavy*, 809 F.2d 1317, 1331-34 (8th Cir. 1987), *cert. denied*, 484 U.S. 848.

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its grant title. *See, Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C.Cir. 1986) ("a court should be extra cautious in dismissing a case for nonjoinder where the plaintiff" has no adequate remedy elsewhere). In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110-12 (1968), the Court also advised that a court of appeals should be extra cautious in finding a party indispensable after a judgment in the trial court. The court of appeals herein made no mention of these factors.

[11] The court also noted that it has not been definitely determined whether the standard of appellate review of Rule 19 decisions should be abuse of discretion or plenary review. Without taking a position, the court stated its sympathy for the former, although it pointed out that the

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The Ninth Circuit's analysis in *Puyallup*, 717 F.2d at 1254, holds in even more straightforward fashion that

> the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party. . . .

(Emphasis in original).[12] Equally important, the Ninth Circuit's careful analysis under Rule 19 of the State of Washington's status, and whether the state was an indispensable party because of its title to navigable streams, contrasts sharply with the Tenth Circuit's total disregard of Rule 19.

Finally, the Tenth Circuit opinion conflicts with *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2nd Cir. 1983), *aff'd in part*, 470 U.S. 226 (1985). In that case a tribe sued two counties in trespass, asserting a prior title. The court held that neither the United States nor the State of New York was an indispensable party, even though the case could have broad effects on titles, even though the state was the source of the counties' claimed titles, and even though the tribe was simultaneously pursuing claims against the United States under the Indian Claims Commission Act. 434 F.Supp. at 544-46.

The panel below largely rationalized its finding of indispensability on an alleged duty of the United States to protect patents issued by it and on the pendency of the Pueblo's claims case under the Indian Claims Commission Act.[13] The

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harshness of a finding of indispensability could justify a more exacting standard for review of those determinations. This case presents the Court with the opportunity to clarify the standard.

[12] In *Puyallup*, the United States was the origin of both the port's claim of title (through patented adjoining lands) and the state's claim of title (through the navigation servitude), yet it was expressly held not to be an indispensable party.

[13] The history of that case is recited in part in: *Pueblo of San Ildefonso v. United States*, 30 Ind.Cl.Comm. 234 (1973); *United States v.*

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court felt that a rogue stipulation by the Pueblo's claims attorneys that the Pueblo's *aboriginal title* to an area within an approximate outer perimeter (including the disputed tracts) had been extinguished, put the United States in the contradictory position of indirectly protecting the Raels' patents in the claims case while helping the Pueblo defeat them in this case.[14] The court thought that the United States should make a decision to be in one case or the other because of a duty "not to actively seek to defeat the homestead titles it issued."[15] [App. 10].

This rationale has nothing whatever to do with Rule 19 or the factors listed therein, as the panel opinion concedes. [App. 10-11]. Furthermore, the United States has no duty to protect the Raels' patents, which are merely quitclaims, against a tribe subject to federal trusteeship. *Sokaogon*, 879

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Pueblo of San Ildefonso, 513 F.2d 1383 (Ct.Cl. 1975); *Pueblo of Santo Domingo v. United States*, 42 Ind. Cl. Comm. 306 (1978); *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct.Cl. 1981), *cert. denied*, 456 U.S. 1006 (1982).

[14] The Interior Department, through the Bureau of Indian Affairs, investigated the Pueblo's title under the Gallegos grant, finding it valid. [Tr. Trans. 8/6/86 at 216, 218-23]. Consequently, it provided assistance to the Pueblo in preparing its case and authorized a federal surveyor and realty official to testify at trial on behalf of the Pueblo.

[15] The court nowhere explained how this duty would either be vitiated or fulfilled by the United States's intervention in this case. Since the United States can sue the Raels directly, notwithstanding their patents, *see, e.g., United States v. Carpenter*, 111 U.S. 347 (1884), it does not make sense to state that the government is an indispensable party because of a duty to not attack the patents. Curiously, the panel opinion does not say whether the United States would have to become a plaintiff or a defendant after remand. In any event, 28 U.S.C. §1362 explicitly authorizes tribes to sue in lieu of the United States, and its legislative history specifically includes in that authority challenges to patents issued by the government. S.Rep. No. 1507, 89th Cong., 2d Sess. at 2 (1966) (reprinted in 112 *Cong. Rec.* 20769, August 26, 1966); H.Rep. No. 2040, 89th Cong., 2d Sess. at 2-4 (1966).

F.2d 300; *Cramer v. United States*, 261 U.S. 219, 233-34 (1923); *Northern Pac. Ry. Co. v. United States*, 227 U.S. 355, 367 (1913) (6-year statute of limitations to challenge patents does not apply when the United States is asserting the rights of a tribe); *Ainsa*, 175 U.S. at 90 (anyone claiming a superior title can challenge a patent in the ordinary courts); *Real de Dolores del Oro v. United States*, 175 U.S 71, 75 (1899) (a patent is "a mere quit claim" and there is "no reason why the Government should be called upon to protect it"); *see also, Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 683-84 (1974) (Rehnquist, J., concurring) (federal interest in lands patented to private parties ends upon issuance, such that a dispute over patented lands is not a federal case and does not arise under the laws of the United States).

Most incredible of all, the Pueblo's title to the Gallegos grant is not even the subject of any claim in the claims case. The stipulation there applies only to *aboriginal title*, a distinct and separable interest based upon aboriginal use and occupancy. [App. 130-31]. Aboriginal title is not even a property right, nor is it compensable under the United States Constitution. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). The Pueblo's title to the Gallegos grant on the other hand, is a fee-simple absolute based upon a land grant, and is entirely independent of the stipulation.

This Court has squarely held that a title claim based upon an independent source of title cannot be affected by a proceeding over a separate title under the Indian Claims Commission Act, even by a final judgment and payment under that Act. *United States v. Dann*, 470 U.S. 39, 50 (1985) (*individual* aboriginal title not affected by final judgment and payment for *tribal* aboriginal title claims). So, too, has the Tenth Circuit. *Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1462 n.14 (10th Cir. 1987) (payment of judgment for extinguishment of aboriginal title did not affect title claim based upon executive order reservation). That rule has special force here where there has neither been a final judgment nor payment in the claims case. The court of appeals herein ignored these controlling precedents and wandered off into an absurd application of the indispensability doctrine.

The panel altogether misunderstood the claims case and mischaracterized the proceedings therein, stating that the Pueblo stipulated that the land was "taken" by the United States and that the United States is now the "owner" of the land within the Gallegos grant. [App. 8-9]. This is untrue, as shown by the stipulation itself. [App. 130-31].[16]

The court of appeals further neglected the fact that the subdocket involving the stipulation is on hold so that the Pueblo can pursue other avenues. [App. 132].

It is significant, too, that the court of appeals failed to explain why the claims case and the stipulation should take precedence over the Gallegos grant title case in any event. All things being equal, the case that addresses the merits of the Pueblo's title should be favored. *Sokaogon*, 879 F.2d at 304 ("public interest favors where possible the resolution of legal questions on the merits"). The panel's arbitrary preference for

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[16] The court was oblivious to the common use of stipulations in claims proceedings as a convenient expedient. In Santo Domingo's case, the court of claims discussed the need for "practical solutions" such as stipulations and average valuation dates in dealing with aboriginal title issues because the United States had never in fact undertaken to extinguish aboriginal title. *United States v. Pueblo of San Ildefonso*, 513 F.2d at 1391. The court of claims made clear in other cases that stipulations as to aboriginal title and the use of average valuation dates were necessary legal fictions. *United States v. Northern Paiute Nation*, 490 F.2d 954 (Ct.Cl. 1974); *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1394-95 (Ct.Cl. 1974) (Nichols, J., concurring). Such approximations have relevance in the amorphous context of valuing concededly extinguished aboriginal title, but they cannot rationally be bootstrapped into unintended application to another title, to which they are irrelevant. That principle has special force here where the stipulation was unauthorized by the Pueblo and contradicted its long-standing position that its aboriginal title had never been extinguished. *Pueblo of Santo Domingo*, 647 F.2d at 1088. Under these circumstances, it would be a gross miscarriage of justice to allow the stipulation to cut down a title to which, by its plain terms, it does not apply. The stipulation must be read narrowly, consistent with the canons that Indian title rights can only be extinguished by express language. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353-54 (1941).

the claims case also conflicts head-on with the *Oneida* case, wherein both a claims case and a title case were pursued simultaneously, and the former was eventually dismissed in favor of the title case, a fact noted by this Court when the case was before it. 434 F.Supp. 527, 531 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2nd Cir. 1983), *aff'd in part*, 470 U.S. 226, 250 n.25 (1985); *see also*, *United States v. Oneida Nation of New York*, 576 F.2d 870, 872-74 (Ct.Cl. 1978).

As is clear from those proceedings, only a final judgment and payment can have any preclusive effect on the Pueblo's aboriginal title. Even if such preclusion as to aboriginal title were to occur, it would not affect the Pueblo's fee title to the Gallegos grant. The court of appeals should not be allowed arbitrarily to quash the Pueblo's fee-simple title claim to the Gallegos grant on the basis of an irrelevant aboriginal title claim in another court, particularly when in doing so the court mangles Rule 19 and flagrantly violates controlling precedent. This Court should exercise its supervisory authority to clarify once and for all the issue of United States indispensability in title cases against private parties whose claims of title trace back to the United States.

II. Vacating Partial Summary Judgment That Had Been Based Upon Admittedly Authentic Legal Documents, Consensus Among Experts For Both Sides, Admissions Of The Nonmoving Parties Who Had The Burden Of Proof, And The Failure Of The Nonmoving Parties To Challenge Key Facts Or Proffer Any Evidence, Conflicts With Applicable Decisions Of This Court And Decisions Of Other Courts Of Appeals.

The district court granted partial summary judgment to the Pueblo on five distinct factual issues.[17] In support of its

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[17] The first three of those issues went toward the ultimate issue of Santo Domingo's ownership of the Gallegos grant under Spain through the advent of American sovereignty upon ratification of the Treaty of Guadalupe Hidalgo, 9 Stat. 929 (1848). The law applicable to such a grant title and the grant's validity were briefed at length. The fourth

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motion for summary judgment on these issues, the Pueblo submitted several Spanish documents of conceded authenticity from official archives, with translations by the Pueblo's expert witness historian, Dr. Myra Ellen Jenkins. It also submitted an affidavit and two reports by Dr. Jenkins, one a history of the Gallegos grant and the other an analysis of Spanish law and policy toward Pueblo lands and land grants. Dr. Jenkins concluded [App. 54]:

> There is no doubt in my mind that the Gallegos Grant was a valid Spanish grant, and that Spanish authorities recognized and affirmed Santo Domingo's title to the grant, from the purchase in 1748 up through the end of Spanish sovereignty in New Mexico . . . I would say, in fact, that Santo Domingo's ownership of the Gallegos Grant is better documented than is virtually any other title acquired under the Spanish period in New Mexico with which I am familiar.

Significantly, the Raels' own historian, Dr. John Baxter, agreed fully with Dr. Jenkins. He concluded in a 1984 summary report that the Gallegos grant was issued by Governor Bustamante, that Santo Domingo purchased it in 1748 from Gallegos's widow and children, that Spanish officials recognized and protected Santo Domingo's title thereafter, and that nothing prior to American sovereignty impaired the Pueblo's ownership of the grant. [Doc. 20, 11/14/85, Exh. 1]. A year later, at his deposition, after the motion for summary judgment had been filed, Dr. Baxter testified that he concurred with Dr. Jenkins's conclusions, and at trial he again testified as to his agreement. [App. 94-99, 104-05, 107, 109, 111, 116,

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factual issue was whether the United States had ever impaired the Pueblo's legal title. This issue involved questions of law regarding Spanish titles in New Mexico and the statutes governing the status and recognition of those titles. The regime in New Mexico differed dramatically from that in California. *Ainsa v. N.M. & Ariz. R. Co.*, 175 U.S. 76 (1899); *compare*, *Summa Corp. v. California*, 466 U.S. 198 (1984). The last factual issue was the basis for the Raels' claimed title, *i.e.*, homestead patents.

118-19, 124]. Because of Dr. Baxter's unequivocal concordance with Dr. Jenkins, the Pueblo submitted his deposition in support of its motion for summary judgment. [App. N]. The Pueblo also relied upon the Raels' own answers to requests for admissions, wherein they admitted the issuance of the Gallegos grant by Governor Bustamante and the execution of the 1748 deed by Maria Josefa Gutiérrez. [App. 17].[18]

In the face of this showing, counsel for the Raels made no responding evidentiary submission on the issues ruled upon by the district court. Instead he relied upon his own *ipse dixit*, raising inconsequential points about the Pueblo's evidence, making unsupported allegations, and speculating about possible issues.

For example, he pointed out that there is no direct documentary evidence of the date of Gallegos's death, and that Dr. Jenkins relied upon a secondary source for the date of Gallegos's marriage to Maria Josefa Gutiérrez.[19] He pointed out

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[18] The Raels stated in response to a request by the Pueblo, that

> The Defendants admit that in 1730 Governor Juan Domingo de Bustamante signed a piece of paper that purported by [sic] granted to Diego Gallegos the tract generally described in Request No. 9, though the Defendants specifically deny the authority or legality of the purported Gallegos grant.

[Pl. Exh.34, Tr. Trans. 8/5/86 at 4]. As recognized by the district court, it is well established that "The making of a grant is *prima facie* evidence of its validity." [App. 17]; *see also*, *Crespin v. United States*, 168 U.S. 208, 212-13 (1897), and cases cited therein. Two land grants issued by Governor Bustamante were confirmed by decisions of this Court. *Whitney v. United States*, 167 U.S. 529 (1897) (Cañada de Cochiti grant); *United States v. Conway*, 175 U.S. 60 (1899) (Cuyamungue grant).

[19] The Raels' counsel made no contention that Gallegos had not died prior to the 1748 deed, so the fact that a precise date for his death was not shown was immaterial. The deed, which was admitted to be authentic, provided indirect evidence of Gallegos's death prior to 1748. The source for the date of Gallegos's marriage was *Origins of New Mexico Families in the Spanish Colonial Period* (1954), by Fray Angelico Chavez, a standard reference that cites the archival marriage documents. Dr. Jenkins cited Dr. Chavez in her report, but she also examined microfilm of the original documents. [Tr. Trans. 8/5/86 at 182-83].

that one certified Spanish copy of the grant documents contained a typographical error, transposing the words "oriente" (east) and "oeste" (west), a routine mistake that was later corrected by Spanish officials. He stated there was no definite proof that Gallegos lived on the grant for four years, citing Dr. Jenkins, which point was irrelevant according to her because such a rule was not even instituted until more than twenty years after this grant was issued, and in any event the required residency was always stated as a condition in the grant documents themselves. Moreover, Spanish officials never acted to challenge the title, but instead continued to recognize it. [Doc. 122, 11/18/85, Exh. B. at 51, 79-80]. Counsel also incorrectly asserted, without citation, that the Spanish King personally had to confirm land grants, and he conjectured that there might be other issues under Spanish law, such as the descent laws, that would require investigation by a Spanish legal expert.

Finally, counsel speculated that a deed of a half interest in a tract called San Miguel de la Cruz to one Miguel de la Vega y Coca "can be factually argued as being the Gallegos land grant." [Doc. 122, 11/18/85, at 3]. The Raels, however, did not make that argument and submitted no copy of the deed or a translation. As recognized by the district court, the Vega y Coca deed was immaterial because the Raels made no claim under it. [App. 18]. Moreover, no evidence even linked it to the Gallegos grant except that it was in the same general region, nor could it defeat the Pueblo's title in any event.[20]

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[20] Counsel for the Raels cited Dr. Jenkins's report. She concluded that the deed had nothing to do with the Gallegos grant. It made no reference to the grant, it contained no boundary calls at all, it referred to a separate name for the land deeded, it did not arise during the 1748 sale proceeding, and it never came up in the subsequent investigations of the grant by Spanish authorities. Moreover, those authorities recognized Santo Domingo's possession and ownership of the entire grant. Since Gallegos sold land and sought to engage in other transactions in the general area, there is no way that this deed can be linked to the Gallegos grant as opposed to another grant. [Doc. 122, 11/18/85, Exh. B at 45-46].

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Not only did the Raels fail to make any evidentiary submission on the issues of ownership of the Gallegos grant, they failed altogether to challenge the material facts that Governor Bustamante issued the grant to Gallegos (indeed they admitted it), and that Spanish authorities repeatedly recognized and protected the Pueblo's title to the Gallegos grant. These facts, together with the material facts that the United States did not divest the Pueblo of its title and that the Raels claim title under homestead patents, must under any view of Rule 56 be taken as established.[21]

Several months after the Pueblo's extensive, affirmative showing followed by the Raels' nonproduction, the district court granted partial summary judgment. The court of appeals vacated, citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and declaring that the Pueblo had not met its initial burden to show "the absence of a genuine issue concerning any material fact." [App. 11, 12]. In the court of appeals's view, the Raels were not required to make any evidentiary showing, only to point out perceived deficiencies in the Pueblo's evidence. By so holding, the court of appeals imposed an erroneous burden on the Pueblo, that of negating unsupported and immaterial allegations of fact upon which the Raels would have the burden of proof at trial. The court both

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In fact, Dr. Baxter testified at trial that the deed could not with any reliability be identified with the Gallegos grant and that in his opinion Gallegos's widow sold the entire Gallegos grant to Santo Domingo. [App. 111-12, 116-19]. A simple reference to a fatally vague deed that was not even in the record, which cannot be tied to the Gallegos grant, which is never referred to in any subsequent document, and which purportedly conveys only a half interest, plainly does not raise a "genuine" issue of material fact. No jury could rationally rule in favor of the Raels in reliance on the deed. In any event, the Raels' intentional failure to put the deed or a translation into the record precludes them on appeal from claiming talismanic power for the deed.

[21] Local Rule 9(j)(2) of the New Mexico District Court states: "All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted."

ignored and violated this Court's recent pronouncements in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Pueblo was obligated under Rule 56, Fed.R.Civ.P., to meet an initial burden of production, making a prima facie case that it was entitled to summary judgment.[22] Under *Celotex*, however, the Pueblo was not required to anticipate and disprove the Raels' case. 477 U.S. at 323, 325, 328 (White, J., concurring), and 329 (Brennan, J., dissenting). In moving for summary judgment, the Pueblo relied upon its own substantial title and documentary evidence, the conclusions of its own and the Raels' experts, and admissions by the Raels. Given the Spanish documents and the accord in the expert testimony, the Pueblo readily met its initial burden of production in an affirmative fashion. Given the admissions of the Raels and their failure to challenge most of the Pueblo's asserted facts, there can be no doubt that the Pueblo met its initial burden.

The Pueblo also met its initial burden for the *further reason* that the Raels had the burden of proof to demonstrate that the Pueblo *did not* hold title to the Gallegos grant at the time of the Treaty of Guadalupe Hidalgo.[23] The *Celotex* decision makes it clear that if the burden of proof at trial is on

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[22] The admitted issuance of the Gallegos grant established a prima facie case of its validity. *Supra* at n.18. The same principle applied to the deed to the Pueblo. The unchallenged fact that Spanish officials recognized and protected the Pueblo's title made a prima facie case clearcut. A party moving for summary judgment is entitled to all the presumptions accorded its position by law. *United States v. General Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1254 (9th Cir. 1982); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986).

[23] The court of appeals did not question that the Raels had the burden of proof under 25 U.S.C. § 194 on all non-boundary issues about the Gallegos grant. The court, however, completely ignored the Raels' burden in its discussion of the summary judgment issues, contrary to *Liberty Lobby*, 477 U.S. at 254-56, which held that determination of a motion for summary judgment must be guided by the burden of proof and the substantive evidentiary standard.

the nonmovant, the moving party's initial burden can be met by pointing out that there is an absence of evidence to support the nonmoving party's case.[24] *Id.* at 325; *see also, Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). The Pueblo demonstrated that the Raels' own expert supported the Pueblo's case, and that no witness and no evidence in the record could at trial support a judgment for the Raels. Again, the Raels' admissions and the admissions of their expert witness showed that they conceded the critical facts. The Pueblo also emphasized that the Raels raised no challenge at all to the highly relevant fact that from the time of the 1748 deed to the end of Spanish sovereignty, Spanish officials consistently recognized and protected the Pueblo's title to the grant.[25] If the case had gone to trial on the issues decided by the district court, the Raels would have been able only to seek to impeach the credibility of the Pueblo's witnesses and evidence. Under these circumstances, the Pueblo easily met its initial burden of production, according to either the majority, the concurring, or the dissenting views in the *Celotex* case.

Because the Pueblo met its burden, the Raels were required to come forth with evidence of specific facts showing a

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[24] The majority, the concurrence by Justice White, and the dissent by Justice Brennan all agreed on this point. A moving party's initial burden, where the nonmoving party has the burden of proof, can be met in two ways, either by an affirmative showing of evidence, or by a showing that the evidence in the record cannot support a verdict for the nonmoving party. Nothing in the court of appeals's decision reflects an understanding of these options, *both* of which were satisfied by the Pueblo.

[25] Under Spanish law ten years of possession gave title. *Hayes v. United States*, 170 U.S. 637, 649-53 (1898). American law held that title under a Spanish grant will be presumed upon twenty years of possession. *United States v. Chaves*, 159 U.S. 452, 463-64 (1895). The Pueblo's documented long possession of the grant, coupled with the Spanish government's recognition and protection of the Pueblo's ownership under the 1748 deed, alone sufficed to establish the Pueblo's title in this case as a matter of law.

genuine issue of material fact that required trial. *Celotex*, 477 U.S. at 322-23; *Liberty Lobby*, 477 U.S. 242; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122-23 (5th Cir. 1988). To avoid summary judgment, that evidence had to be sufficient for a reasonable jury to enter judgment in the Raels' favor, under the applicable burden of proof. *Liberty Lobby*, 477 U.S. at 249-55. Instead, they produced no evidence on the issues of Pueblo ownership. This "complete failure of proof" mandated entry of summary judgment. *Celotex*, 477 U.S. at 322-23.

Because the court of appeals failed to engage in the type of analysis required by *Celotex* and *Liberty Lobby*, it carelessly undid a partial summary judgment that was mandated by this Court's decisions.[26]

III. The Holding That 25 U.S.C. § 194 Does Not Apply To Boundary Location Issues Conflicts With The Plain Meaning Of The Statute And With This Court's Decision In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

The jury herein found that the disputed tracts lay inside the exterior boundaries of the Gallegos grant. [App. 43]. The district court instructed the jury that the Raels had the burden of proving by a preponderance of the evidence that the boundaries of the Gallegos grant did not embrace the disputed

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[26] As an example of the court's sloppiness, it stated that one of the "serious fact questions" was that there was "no identification of the identity of the grantor in the deed to the Pueblo." [App. 12]. Not only was the court wrong (the very first sentence of the deed identifies the grantor), the Raels did not even raise the issue, either in the district court or in the court of appeals. [App. 59]. Other facts mentioned by the court as grounds for vacating the district court's grant of partial summary judgment had to do with boundaries, concerning which the district court *denied* summary judgment and held a jury trial.

land.[27] [App. 44-47]. The court of appeals held that this instruction was in error because 25 U.S.C. § 194 does not apply to boundary location issues. [App. 14]. The panel reasoned syllogistically that boundary issues are not title issues, and because § 194 applies by its terms to "rights of property" or title, therefore the statute did not apply to issues as to the boundaries of the Gallegos grant. According to the court, the Pueblo should have borne the burden of proof at trial on the boundary issues.

In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court announced that

> Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute. The usual way of describing real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments.

Id. at 668-69 (emphasis in original). The Court thus recognized that rights of property to land are not floating rights, but instead attach to particular, fixed tracts. The question of boundaries is an essential one, and the right to land within certain boundaries is as much a "right of property" as any other title issue. *Pinkerton v. Ledoux*, 129 U.S. 346, 352-54 (1889); *United States v. Fossatt*, 62 U.S. 445, 448-49 (1859).

The exception to Section 194's coverage drawn by the court of appeals makes no sense. The statute does not state any exception, and by its plain terms it casts the entire burden of proof on the non-Indian. Just so, the *Wilson* decision makes clear that the burden on the non-Indian is comprehensive, including both the burden of production and the burden of persuasion. *Wilson*, 442 U.S. at 669.

Section 194 had a broadly remedial purpose "to protect the rights of Indians to their properties." *Id.* at 664. In particular it was devised "to protect Indians from non-Indian

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[27] The instruction was derived from a reading of the instructions considered in *Pinkerton v. Ledoux*, 129 U.S. 346 (1889), and *Trenier v. Stewart*, 101 U.S. 797 (1879), but with the burden of proof shifted to the Raels in accordance with 25 U.S.C. § 194.

squatters on their lands." *Id.* at 665. At the time it was enacted, tribal ownership was primarily under "aboriginal title, a possessory right" based upon tribal use and occupancy. *Id.* A tribe's possessory rights, according to a contemporary decision of the Court, had to be viewed in accordance with its habits and customs, and "their hunting grounds were as much in their actual possession as the cleared fields of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). The boundaries of lands held under aboriginal title were thus necessarily imprecise and difficult of proof.

The policy at the time of the passage of Section 194 (in 1822 and 1834) was to respect Indian title, in part by authorizing settlement only on "public lands" to which there was no claim of Indian title. *Cramer*, 261 U.S. 219; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Newhall v. Sanger*, 92 U.S. 761, 763 (1875); F. Cohen, *Handbook of Federal Indian Law*, 209 n.19, 520 (1982 ed.). This policy "was founded on the desire to maintain just and peaceable relations with Indians." *Santa Fe Pacific R. Co.*, 314 U.S. at 346. Questions as to the territorial extent of Indian lands, and whether the lands possessed by non-Indians were in fact public lands open to entry were inevitable. Boundary issues at the time of Section 194's enactment were thus probably the critical issues envisioned by Congress as likely to arise in a dispute between Indians and non-Indians about "the right of property."[28]

This is reflected in the statute's reference to "previous possession" as a triggering event to shift the burden of proof.

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[28] Section 194 speaks in the singular, making it clear that it covers in the entirety the ownership of a piece of real property. The court of appeals misquotes the statute, referring to "rights of property," as if there is a core title interest separable from the issue of location, and that only this narrow interest is protected by Section 194. Such metaphysical hairsplitting of Section 194 conflicts with the usage of common, even vernacular, words in the statute, which this Court has previously held must be read broadly. *Wilson*, 442 U.S. at 664-67 (the word "Indian" includes tribes and the word "white person" means non-Indians and includes corporations).

The act of possession is itself geographical and has territorial boundaries. It was only logical that once tribal possession of an area was shown, the non-Indian should be required to shoulder the burden of establishing that none of the land entered upon by him was subject to Indian title, but rather was lawfully subject to entry. As in *Wilson*, limiting the scope of Section 194 to non-location issues "would be to drain [it] of . . . significance." 442 U.S. at 665. Under these circumstances, an intent by Congress to place on non-Indians the burden of proof as to all issues except location and boundaries would be highly unlikely. If that was Congress's intent, surely it would have so stated. *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976).

Moreover, "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed." *Wilson*, 442 U.S. at 666, quoting *Bryan*, 426 U.S. at 392. In view of Section 194's protective purpose and the circumstances under which it was enacted, it must be adjudged to apply to issues of the boundaries of Indian lands. The contrary opinion of the court of appeals is so clearly wrong and so opposed to the *Wilson* decision, that certiorari should be granted to correct the error.

The court of appeals also stated that the triggering of Section 194 required "a prima facie case on geography made under *United States v. Trujillo*, 853 F.2d 800 (10th Cir. [1988]), or *Begay v. Albers*, 721 F.2d 1274 (10th Cir. [1983])." [App. 14]. In both cases there were official surveys and patents that clearly demarcated the Indian boundaries.[29] The court of appeals thus would impose such formalities here. Again, the court's cramped reading of Section 194 conflicts with the statute's plain meaning and with the *Wilson* decision, both of which affirm that the burden shifts when there is a prima facie showing of *either* "prior possession" of, *or* "title"

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[29] *United States v. Trujillo*, 853 F.2d 800 (10th Cir. 1988), involved issues as to the boundary between tribal land and private claims within the Pueblo of Taos land grant. As that decision shows, the Tenth Circuit has itself sustained application of Section 194 to boundary disputes.

to, the area in dispute. *Wilson*, 442 U.S. at 660. Requiring proof on the order of official surveys and patents would require the tribe to prove its case on the merits prior to a shifting of the burden of proof, a proposition expressly rejected in *Wilson*. *Id.* at 668-69.

Spanish land grants in New Mexico typically contained a boundary call in each of the four cardinal directions. The Gallegos grant was no exception. Its boundary calls were, on the *north*, "the old pueblo of Cochiti, which is in the sierra;" on the *south*, "a spring of water which is in the cañada that runs down to a little house known as that of Cubero;" on the *west* "the road which runs from Jemez to San Felipe;" and on the *east*, "the lands of the said Pueblo [Santo Domingo]." [App. 59-60, 61-62].

Other documents provided further information on the location of the grant and its boundaries. For example, in 1768 it was established that the west boundary of the Gallegos grant was the east boundary line of the newly granted Ojo de Borrego grant. [App. 64-70, 84]. In 1815 Spanish officials determined that the Gallegos grant lay north of the Santa Rosa de Cubero grant. [App. 71-76]. Other documents showed that the grant was to the west of both Cochiti and Santo Domingo, and that its main access route was located between those two Pueblos. [App. 72-73]. An 1808 letter to the Spanish governor from the Catholic priest at Cochiti indicated that the north boundary of the Gallegos grant was a large ruin adjacent to a small hill at some distance west of Cochiti. [App. 70]. Several Spanish documents dating from 1722 through 1844, including a few official investigations, identified "the lands of the said Pueblo" as extending one league from the church. [App. 57-58, 114-16]. An 1879 document placed the "old pueblo of Cochiti, which is in the sierra" as west of Cochiti and approximately three leagues west of the Rio Grande. With all of this documentary information, the location of the grant was apparent, and it was obvious that the disputed tracts were well within the grant.

In order to establish the boundaries with precision, however, the Pueblo relied upon experts in anthropology, archeology, and in the surveying and investigation of Spanish land

grants, to work in consultation with the historian, Dr. Jenkins.[30] Coming from different perspectives, the experts arrived at an unequivocal consensus on the boundaries of the Gallegos grant. The east boundary is one league west of the Pueblo's old church. The west boundary is the Ojo de Borrego grant. The south boundary call is a large spring known to Santo Domingo as Ata'pa, the *only* spring in Borrego canyon below Borrego spring (the latter spring is associated with the adjoining Ojo de Borrego grant). Finally, the north boundary call is a large ruined pueblo known to archaeologists as L.A. 85, a site long associated by locals with Cochiti, and the *only* sizeable ruin within the general area.[31]

These boundary calls were established by the boundaries of adjacent lands on the east and west, and by imposing physical landmarks on the north and south for which there were no alternatives. In *Whitney v. United States*, 167 U.S. 529 (1897), this court sustained the proposition that Spanish grant boundaries

> must be explained by the context, the topography of the country, the customary adoption in royal grants of prominent natural objects, or conspicuous artificial objects, as landmarks, the significance of names used as descriptive of well-known places, and by the reasonable probabilities of the case.

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[30] The experts used the Spanish documents, records of adjoining grants, other historical documents, court records, field inspections, numerous maps, aerial photographs, ethnological reports, reputation in the community, informants, field research, and their own range of technical skills, *e.g.*, petrography, paleography, spectroscopic analysis, pottery dating, etc., in conducting their analyses.

[31] The designation refers to numbers assigned by the New Mexico Laboratory of Anthropology to archaeological sites. The nearest other large ruin (L.A. 84), some six miles distant, was ruled out by its identification with the Cañada de Cochiti grant, *north* of Cochiti Pueblo, not west, and its different description as an old Cochiti pueblo on Cochiti Mesa to which the Indians fled during the Pueblo Revolt. *See, Whitney v. United States*, 167 U.S. 529, 535-40 (1897).

Id. at 540. According to the government surveyor provided by the United States,

> I have visited all of the Gallegos Grant boundaries several times. They are all very logical boundary calls and fit together exceedingly well. They fit the descriptions provided in the Spanish documents without any anomalies and make of the Gallegos Grant a coherent geographical entity. Having reviewed a large number of grant documents and surveys in my position with the federal government, I can state confidently that probably no Spanish grant survey has ever been as thoroughly researched and documented as have the boundaries of the Gallegos Grant. In my opinion there are no plausible alternatives to where I have located the Grant boundaries. In any event, it is certain that the Rael tracts are well within the boundaries of the Gallegos Grant. I cannot see how any defensible realignment of those boundaries could possibly exclude the Rael tracts from the Grant.

[App. 92-93].

In opposition to the unanimity among the experts for the Pueblo, the Raels at trial offered no expert testimony that the Gallegos grant boundaries were other than those claimed. The Raels' archaeologist specifically stated that he had no testimony to offer on the boundary issue. [App. 125-29]. The Raels' historian, Dr. Baxter, the only expert who testified for them about boundaries, stated that he did not dispute the conclusions of the Pueblo's experts as to any boundary. [App. 109, 112-16, 119-24]. The only other witnesses for the Raels were defendants Jerry Rael and Lionel Rael, who offered no testimony on the boundary question.

The Raels thus presented no positive case on the boundaries of the Gallegos grant. Their witnesses neither offered alternative boundary calls, nor did they support alternative alignments that would place the disputed land outside the grant. Instead, the Raels' entire case hinged on impeaching the various experts for the Pueblo, and the primary vehicle for that attempt was the fact that surveys of a few other grants

overlap with the Gallegos grant.[32] Having no affirmative case and no expert testimony with which to challenge the Pueblo's extensive case, *and* assigned the burden of proof, the Raels lost the jury verdict in short order.

The court of appeals's conclusion that the burden of proof instruction was dispositive fails to reflect the fact that the Pueblo's case was overwhelming and the Raels' case nil. Moreover, the court of appeals was absolutely mistaken in holding that 25 U.S.C. § 194 was inapplicable at trial.

CONCLUSION

This simple yet complex ejectment case was mangled by the court of appeals. The several conflicts with decisions of this Court, other courts of appeals, and its own decisions are striking. The court has departed in a major way from the accepted and usual course of judicial proceedings, failing completely to undertake analyses mandated by this Court. After more than six years of litigation the parties are now back to square one, on hold indefinitely, with severely clouded titles. Neither side can take succor from the action of the court of appeals, but the Pueblo of Santo Domingo is especially anxious because the land in dispute is adjacent to the Pueblo's single most important religious site, crucial to its ancient religious traditions. [App. 80-82]. Without vindication of its title to the Gallegos grant, the Pueblo will lose control

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[32] The 1689 grant to Santo Domingo, made during the Pueblo Revolt, overlaps significantly with the Gallegos grant. The documents for that grant, however, both Dr. Jenkins and Dr. Baxter agreed, never surfaced and were never referred to during the 18th and early 19th centuries for any of the eleven Pueblos holding such grants. [App. 110-11, 113-14]. The Gallegos grant was made and its boundaries were determined independently of the 1689 grant, and the latter grant was therefore irrelevant to the issue of the boundaries of the Gallegos grant. The Raels' heavy reliance on this overlap betrayed their lack of a case. As the court of appeals conceded, grant overlaps are very common in New Mexico [App. 5]. The 1689 grant survey alone overlaps with five other grants. Since scarcely a land grant in New Mexico is free of an overlap, the fact of an overlap is not particularly significant.

over a vital area. *See, Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (if a tribe does not own a religious site it has no constitutionally protected religious interest in the site's protection). A mistake has been made that strikes at the heart of the Pueblo's religion, and if it is not corrected by this Court a terrible injustice might be wrought. For all of these reasons the Pueblo of Santo Domingo earnestly petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 3rd day of May, 1990.

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APPENDIX INDEX

APPENDIX INDEX – Continued

APPENDIX A

(January 3, 1990)

No. ___

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUEBLO OF SANTO DOMINGO; UNITED STATES OF AMERICA, ex rel., Pueblo of Santo Domingo,	)	
Plaintiff-Appellee,	)	
v.	)	No. 86-2459
ARNOLD J. RAEL; SOPHIA SSOCIATED TYPE [sic] RAEL; SERAFIN RAEL; LIONEL E. RAEL; JOSE IVAN RAEL,	)	
Defendants-Appellants,	)	
and	)	
HENRY J. RAEL; JERRY C. RAEL,	)	
Defendants.	)	

ORDER

Filed January 3, 1990

Before HOLLOWAY, Chief Judge, SETH, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearingg [sic] en banc were transmitted to all judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Chief Deputy Clerk

APPENDIX B

(July 20, 1989)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PUEBLO OF SANTO DOMINGO, Plaintiff-Appellee, v. ARNOLD RAEL, SOPHIA RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY J. RAEL, and JERRY C. RAEL, Defendants-Appellants.	)	No. 86-2459 (U.S.D.C. Civil No. 83-1888-HB) (D.N.M.)

ORDER AND JUDGMENT*

Before MCKAY, SETH and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.8. The

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

cause is therefore ordered submitted without oral argument.

The plaintiff, Pueblo of Santo Domingo ("the Pueblo"), brought this action in ejectment against the defendants, Arnold Rael, Sophia Rael, Serafin Rael, Lionel E. Rael, Jose Ivan Rael, and Jerry C. Rael, to recover possession of three tracts of land encompassing approximately 1,280 acres located west of the Rio Grande in northern New Mexico. Plaintiff claimed this land on two alternative theories. First, that its aboriginal title has never been extinguished by the United States Government. Second, it claims fee simple ownership by its purchase in 1748 of the Diego Gallegos Land Grant from the widow of the original grantee. Defendants, long-time Hispanic residents of the general area, assert ownership to these three tracts of land under homestead patents issued by the United States in the 1930s and 1940s pursuant to the Homestead Act of 1862.

Before trial, the court granted summary judgment to plaintiff on the issue of the validity of its title to the Gallegos Grant. Plaintiff's alternative claim, based on its aboriginal use of the three tracts, was dismissed without prejudice and the trial proceeded on the remaining issue of whether the disputed land was within the boundaries of the Gallegos Grant. The jury found that the three tracts of land were within the boundaries of the grant, and the court entered judgment in favor of plaintiff. Defendants appeal the judgment of the trial court on several grounds.

On January 13, 1730, the Spanish Governor of New Mexico, Juan Domingo de Bustamante, granted to a Spanish citizen named Diego Gallegos a tract of land west of

the Rio Grande, near the Pueblo of Santo Domingo. On December 16, 1730, Diego Gallegos sold a tract of land to Miguel de la Vega y Coca, described as one-half of a grant he had received just west of the Pueblo of Santo Domingo. Thereafter, on November 28, 1748, a person described in the conveyance as the widow of Diego Gallegos, Maria Josefa Gutierrez, and her children, purported to convey the entire grant to the Pueblo of Santo Domingo.

The original 1748 deed to the Gallegos Grant together with the documents to the Domingo Pueblo Grant were lodged with the Surveyor General of New Mexico in 1856. The Pueblo thereby sought confirmation of both grants. In 1858, Congress confirmed the Pueblo's title to its main grant, the Santo Domingo Grant, Act of Dec. 22, 1958, ch. 5, 11 Stat. 374, but neither the statute nor the attached report of the Surveyor General make any mention of the Gallegos Grant. However, perhaps by coincidence, the size of the Pueblo Grant so confirmed by Congress was equal to the typical pueblo grant under Spanish law plus one-half of the Gallegos Grant. The Pueblo Grant overlapped the Gallegos Grant in part. Overlapping grants were, of course, not unusual.

In 1893, the Pueblo of Santo Domingo filed a petition before the Court of Private Land Claims to again confirm the Gallegos Grant. In a subsequent amended petition, however, it omitted its Gallegos Grant claim and instead sought confirmation of its joint 1770 grant with the San Felipe Pueblo. The joint Santo Domingo-San Felipe Grant was confirmed by the Court of Private Land claims in 1898.

The Pueblo of Santo Domingo filed a claim with the Indian Claims Commission (ICC), for about 223,000 acres, under the Indian Claims Commission Act (ICCA), Act of August 13, 1946, ch. 959, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70-70v-2). This claim, assigned Docket Number 355, is still pending and must be discussed herein at some length because it is a parallel case involving the same tract of land as is concerned in the case before us.

The Pueblo's original petition before the ICC expressly asserted that the lands had never been taken by the United States, and that its aboriginal title had never been extinguished by the federal Government. Thus instead of asking for compensation for the taking of its lands, the Pueblo sought damages for the Government's interference with the Pueblo's rights of use and occupancy of those lands, as well as damages for the Government's failure to protect those rights from private parties.

In 1953 and 1954, testimony was taken by the ICC on the extent of the Pueblo's area of aboriginal use and occupancy. As a result of this testimony, the Bureau of Land Management prepared a map of the claim area depicting the 223,000 acres contained in the Pueblo's aboriginal use and occupancy claim. This area included the land contained in the original Santo Domingo Grant, also just over 77,000 acres of public domain, and nearly all of the area asserted to be in the Gallegos Grant here involved including defendants' homesteads. At no time has plaintiff asserted a source of title under the Gallegos Grant title as a part of the claim it brought before the ICC. Instead it was an aboriginal claim to the same land here concerned and much more.

In 1969, the Pueblo's attorneys entered into a stipulation with the Government in the ICC proceedings to the effect that (1) the map prepared by the Bureau of Land Management depicted the Pueblo's aboriginal lands, (2) the United States had in fact extinguished the Pueblo's aboriginal title to those lands, and (3) the United States should pay the Pueblo the value of the land taken. This stipulation represented a significant departure on the part of the Pueblo from the theory advanced in the complaint it originally filed before the ICC. By the stipulation the issue became the date to be used in setting the land value for the entire tract. In late 1975, the Pueblo (represented by different attorneys) filed a motion in the Court of Claims for leave to withdraw from the 1969 stipulation. The court denied this motion. Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl.). The stipulation is thus still effective.

In the action before this court plaintiff asserts that the attorneys who entered into the 1969 stipulation which changed the course of the ICC proceeding did so without its knowledge or authorization and was entered into in ignorance of plaintiff's deed to the Gallegos Grant. Further, it is asserted that following the "discovery" in 1983 by its attorneys of the Gallegos Grant title documents which had been submitted by the Pueblo to the Surveyor General and several times thereafter to other boards considering land claims, plaintiff brought the grant to the attention of the Claims Court and advised the court of its intention to move to amend the aboriginal area to exclude the grant. As mentioned, the Court had previously denied the Pueblo's motion to withdraw the stipulation concerning in part the same issue. From what information

is available it appears that nothing is left before the Court of Claims on the merits except to determine the monetary value of the entire area as of a historical date or dates to be determined. The Government appears to be urging that a possible date should be when the Pueblo submitted its grant and the Gallegos Grant to the Surveyor General. However, the Pueblo has moved the Court of Claims to alter the aboriginal area map so as to depict the Gallegos Grant and delete those lands from the effect of the 1969 stipulation. The motion apparently is pending.

I.

Prior to trial of the action before us, defendants pointed out that plaintiff's conduct of this lawsuit is untenable given the status of the claim before the Claims Court. The fact remains that when the trial court entered judgment in this case on behalf of plaintiff, ordering defendants to give up possession of the disputed land, plaintiff was still a party to a binding stipulation in another court to the effect that the very same tract of land and other land had been *taken* by the United States. In the ICC proceedings the Government was of course defending and had taken the position that the date for valuation was the only remaining issue, as mentioned.

The trial court here rejected defendants' motion on the issue as to the ICC pending proceedings, noting that

> "plaintiff would appear to be making a good faith effort to exclude the Diego Gallegos Grant from the stipulation. *If plaintiff is successful,* defendants' motion *will be* moot."

Memorandum Opinion and Order, May 16, 1986, at 11 (emphasis added). By entering judgment prior to the resolution of plaintiff's efforts before the Claims Court to remove the Gallegos Grant from the operation of the stipulation with the Government, the trial court apparently deemed it sufficient to note that in no case would the plaintiff be able to recover both the land in question and the value as damages from the Government. This problem, however, does not lend itself to such an easy resolution. The stipulation before the Claims Court goes beyond the issue of damages and states in definitive terms that the United States is the owner of the land in the Gallegos Grant. The action in the Court of Claims concerning the same basic issue as the suit must be allowed to proceed. For this and other reasons hereinafter considered the case must be remanded to the trial court.

II.

The position that the Government is taking in the action pending in the Court of Claims is basically that the Pueblo's title to the entire area there claimed has been extinguished, including the area in the Gallegos Grant. The Stipulation is definitive of this. This position is not consistent with the position it is taking *as to* the case before us according to the statements in plaintiff's brief.

In plaintiff's brief it is recited at some length how the officials of the Department of Interior have assisted plaintiff in the preparation of this case for trial seeking to defeat titles the Government conveyed by the homestead patents to the Raels. Officials also testified on behalf of the plaintiff. No one criticizes the assistance as there are

duties owed to the Pueblo; however, there are also duties owed to others at the same time by the public officials. It would appear that among these other duties is one not to actively seek to defeat the homestead titles it issued to the Raels.

Because the positions taken by the Government in the two proceedings are so inconsistent, and because the plaintiff has selected two forums, a division of the same basic litigation into several pieces has resulted with a selection of different defendants for what is really the same issue, at least in part.

In order to resolve this problem it is necessary that, if the Government does not become a party in these proceedings, in order that the basic dispute can be settled, that on remand this action be held pending in the trial court until the Court of Claims decides the claim pending before it. There is, of course, an abundance of authority holding that Indian tribes may sue individuals or cities in title disputes without the Government becoming a party. These include Oneida Indian Nation v. County of Oneida, 719 F.2d 525 (2d Cir.), *aff'd*, 470 U.S. 226, and Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir.). This authority, however, does not resolve the problem before us where the Government is on both sides of the same issue in two cases and when the Government is actively participating in an action seeking to defeat the titles in its patentees. It is, of course, obvious that the Court of Claims action concerns an aboriginal claim, but the particular land is the same in both proceedings – title is claimed in one and compensation for the land in the other. This obviously is not the circumstance to which the typical indispensable party doctrine is applied; however,

this unusual situation demands the same solution or remedy. There is an obvious need to bring the litigation to a prompt solution in a way that all issues are resolved and all parties bound.

III.

There are several additional issues raised on this appeal which must be considered. The first of these was the summary judgment granted to the plaintiff Pueblo on its title to the Gallegos Grant and really all issues except the location of the grant. The trial court determined that the Pueblo's title was good, that the grant was "validly" granted to Diego Gallegos, and that the United States had not "divested" the Pueblo of the title.

In opposition to plaintiff's motion for summary judgment, defendants sought to raise questions regarding whether or not the Gallegos Grant had been perfected under Spanish law prior to New Mexico's entry into the United States in 1848 under the Treaty of Guadalupe Hidalgo. They also sought to raise fact questions relating to the validity of plaintiff's chain of title to the Gallegos Grant. The trial court however refused to consider these questions in ruling on plaintiff's motion for summary judgment because it said, "these allegations [were] not substantiated by any evidence in the record." This, in our view, was error and appears to be based on a weighing of the evidence.

In Adickes v. S.H. Kress & Co., 398 U.S. 144, the Supreme Court held that, under Fed. R. Civ. P. 56(c), a party moving for summary judgment has the burden "to show initially the absence of a genuine issue concerning

any material fact." *Id.* at 159. *See also* Celotex Corp. v. Catrett, 477 U.S. 317, 325. The plaintiff did not meet this requirement as there were developed a number of material unresolved fact issues as to the validity of the grant and plaintiff's claim of title. They existed in the evidence of plaintiff and were pointed out to the court by the defendant.

A review of the record demonstrates that the trial court erred in holding defendants were required to produce affirmative evidence in support of their assertions regarding deficiencies in the evidence produced by plaintiff which left unresolved fact questions. The serious fact questions raised by the defendants arose from the face of the evidence produced by plaintiff. The expert for plaintiff noted the fact that the deed to Mr. Vega y Coca was nowhere explained, and further that there was no indication of the required residence of the grantee of the grant on the land. Also there was no identification of the identity of the grantor in the deed to the Pueblo. There was a basic confusion as to the relation of the Gallegos Grant to the Pueblo Grant; the conflicting testimony of the Pueblo's witnesses as to the boundaries, especially the eastern boundaries, and the odd size of the Pueblo Grant (which overlapped the Gallegos Grant) when one of plaintiff's experts used typical measurements.

It must be concluded, in the face of these unresolved facts, that the trial court erred in granting summary judgment to plaintiff on the issue of the validity of plaintiff's title and chain of title to the entire Gallegos Grant.

IV.

Defendants argue that the Indian Claims Commission Act, 60 Stat. 1049, divested the trial court of subject matter jurisdiction over this case. We conclude it did not. However, the fact that a claim for the same land by the Pueblo is pending before the Court of Claims prevents this matter from proceeding and requires a remand, as mentioned.

V.

Defendants next argue that the trial court erred in instructing the jury that defendants bore the burden of proving that their three tracts of land were outside the boundaries of the Gallegos Grant. We agree. The *location* of the Gallegos Grant was the *only issue at trial*. This was a question of geography. In ejectment or a suit to quiet title it would seem to be a basic burden in plaintiff's case to establish where the land claimed is located, and again this is not really a title issue at all. The trial court however placed the burden on the defendants to prove the location of the land the plaintiff claims. There was no issue as to the location of defendants' homesteads.

The trial court invoked 25 U.S.C. § 194 in determining that defendants should bear the burden of proof on the one issue, the location issue, tried to the jury. This statute provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in

himself from the fact of previous possession or ownership."

The location of the Gallegos Grant on the ground became a serious issue not only because it was the only one, but because the witnesses, strangely enough, could not fix the boundaries with any degree of accuracy without making assumptions which reduced the testimony to speculation and inconsistencies. For example, one of plaintiff's experts applied a land measure typically used in grants to the pueblos by Spain for one boundary but rejected it for another. It was not demonstrated with any degree of clarity whether or not defendants' land was within the grant or not. The burden issue became determinative of the outcome as the case was so submitted to the jury. 25 U.S.C. § 194 does not apply to the location issue in these circumstances. The trial court had by then decided all the title issues – "the rights of property." In any event, even if it did, there was not a prima facie case on geography made under United Stats [sic] v. Trujillo, 853 F.2d 800 (10th Cir.), or Begay v. Albers, 721 F.2d 1274 (10th Cir.).

Thus it was error for the trial court to place the burden of proof on the defendants to prove the location of plaintiff's claim.

It must be concluded that the case be remanded to the trial court to be held pending until the Court of Claims in Docket 355 resolves the Pueblo's claim for compensation to the extent it covers the Gallegos Grant. When the case again proceeds it shall be in accordance with this opinion. When the Court of Claims proceeding is concluded to the extent indicated above the position of

the United States must be reexamined to determine whether it should still be made a party.

IT IS SO ORDERED.

Entered for the Court

Oliver Seth
Circuit Judge

APPENDIX C

(May 16, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO,

Plaintiff,

vs.

CIV NO. 83-1888 HB

ARNOLD RAEL, SOPHIA RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY J. RAEL, and JERRY C. RAEL,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendants' motion to dismiss and motion to amend answer and plaintiff's motion for summary judgment. The court, having considered the motions, reviewed the file and been apprised of the applicable authorities, concludes that partial summary judgment should be granted.

Plaintiff brings this action in ejectment to try its right to possession of certain tracts of land which are also claimed by the defendants. Plaintiff bases its title to the tracts on aboriginal title and on a Spanish land grant known as the Diego Gallegos Land Grant. Defendants' title originated with homestead patents issued in the late 1930s and early 1940s by the United States government. Plaintiff's motion for summary judgment concerns only the Diego Gallegos Land Grant.

The undisputed facts disclose that on January 13, 1930 [sic], Spanish Governor Juan Domingo de Bustamante, granted to Diego Gallegos, a tract of land in New Mexico. Plaintiff Exhibits 3, 4, 5. The boundaries were described as being on the north, the Old Pueblo of Cochiti which is in the sierra; on the south, by a spring of water which is in the canyon that runs down to the little house known as that of Cubero; on the west, by the road which runs from Jemez to San Felipe; and on the east, by the lands of Santo Domingo. Diego Gallegos was placed in juridical possession of the tract by Andres Montoya, Alcalde of the Keres jurisdiction.

On November 28, 1748, Maria Josefa Gutierrez, widow of Diego Gallegos, and her children, deeded the grant to the Pueblo of Santo Domingo for 400 pesos, by deed executed before Keres Alcalde Juan Vigil. Plaintiff's Exhibit 3. The historical record since 1748 establishes that the Spanish authorities recognized the Santo Domingo's ownership of the Gallegos Grant until the American invasion in 1846. Plaintiff's Exhibits 6 and 8.

The making of a grant is *prima facie* evidence of its validity. *Crespin v. United States*, 168 U.S. 208, 212-13 (1897). Defendants admit that the grant was made and a deed executed. Defendant's Response to Requests for Admissions ¶¶ 9 and 10. Defendants have not submitted any evidence which would put in dispute the authenticity of the documents upon which plaintiff relies in establishing their title. In fact, defendants' own historical expert, John O. Baxter, found that the documents were authentic. Baxter Deposition 22-25. Nor, have defendants submitted any evidence which would indicate that Spain did not

recognize Santo Domingo's title until 1846. Baxter Deposition 40-41.

Defendants have attempted to raise possible technical defects in the original grant and sale to the Pueblo and also in plaintiff's chain of title. Defendants' Material Issues of Fact 2, 3, and 6. However, these allegations are not substantiated by any evidence in the record.**

With the Treaty of the Guadalupe Hidalgo, Article 8 and 9, 9 Stat. 929, 930 (1848), the United States agreed that property of former citizens of Mexico in ceded territory would be "inviolably respected." This was in keeping with the law of nations that private rights of property in land lying within a territory ceded by one independent nation to another by treaty are not affected by the change of sovereignty, and are entitled to protection, whether equitable or legal. *United States v. Perchman*, 7 Pet. 51, 86, 87 (1833); *Ainsa v. New Mexico & Ariz. Railroad*, 175 U.S. 76, 79 (1899).

Plaintiff having thus established its legal title to the Diego Gallegos Grant prior to 1848, there is no genuine issue of material fact concerning its title after 1848 under the Treaty of Guadalupe Hidalgo. The question of title

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** Defendants refer to a deed purporting to convey an interest in property from Diego Gallegos to Miguel de la Vega y Coca on December 16, 1730. Defendants argue that the deed conveyed part of the Gallegos Grant prior to the conveyance to plaintiff. However the deed is not a part of the record on summary judgment. Even if it were, defendants have no standing to challenge plaintiff's title on the basis of that deed, since they do not claim title under it.

after 1848 becomes whether plaintiff's title was ever extinguished or whether plaintiff is otherwise precluded from asserting its title.

In 1854, Congress made it the duty of the Surveyor General of the United States for New Mexico, to ascertain the origin, nature, character and extent of all claims to lands under the laws of Spain and Mexico, and to report on all such claims as originated before the cession of the territory under the Treaty of Guadalupe Hidalgo. Congress was to then pass on the validity of any reported grants with the view of confirming *bona fide* grants. Act of July 22, 1854, 10 Stat. 308, § 8. Titles, complete and perfect prior to cessation, did not need to be submitted to the Surveyor General for confirmation. *Ainsa v. New Mexico & Arizona Railroad Co.*, 175 U.S. 76 (1899). Defendants have not submitted any evidence which would put into question the perfection of plaintiff's title prior to 1848.

Imperfect title under Spanish or Mexican law has been defined by the Supreme Court as a claim whose validity depends upon the performance of conditions in consideration of which the concessions have been made, and which must have been performed, before Spain was bound to perfect the titles. *United States v. Wiggins*, 39 U.S. (14 Pet.) 334, 349-50 (1840). Citing *Wiggins*, *Hancock v. McKinney*, 7 Texas 383, 449-50 (1851) states that a grant requiring no further act to constitute it an absolute title to land from the legal authorities is perfect title under Spanish land grant law. "Where the conditions were not precedent but subsequent, and the final title had issued, or the final act of confirmation had been performed by the proper authority, the title was perfect." *Id.* at 449. Thus, if

nothing remains to be done by the government or its officers title is complete and perfected.

> It is thus seen that . . . [imperfect titles] were not, under the laws of Spain, titles in the sense in which we employ that term, as denoting an estate in fee, but mere claims upon the Government, depending for their obligation upon the performance of their conditions, not even constituting an equity in the claimant until the conditions were performed; and when performed, remaining inchoate and incomplete, having no standing in a court of justice until the final title issued or they were confirmed by the Government.

Id. at 450-51.

This definition is consistent with the intent of the Surveyors General statute. Those titles acquired under Spanish or Mexican law which still required official action to make complete were to be submitted to the Surveyor General for action to either be confirmed by Congress or denied. Those titles which were already recognized as complete by the Spanish or Mexican government needed no further action by any government to confirm. Under this definition, plaintiff's title was perfected prior to 1848.

The parties agree that plaintiff submitted its Pueblo Grant documents along with the Diego Gallegos Grant documents to the Surveyor General. However, defendant has come forward with no evidence that the Diego Gallegos Grant claim was ever the subject of a report to Congress by the Surveyor General or that Congress acted upon such a report. Quite the contrary, the official records of Congress reflect that only the 1689 Pueblo Grant

was acted upon by the Surveyor General and Congress. Annual Report of the Surveyor General of New Mexico, S. Exec. Doc. No. 5, 34th Cong., 3rd Sess. 411 (1856-1857); Act of December 22, 1858, ch. 5, 11 Stat. 374*** Confirmation of the 1689 Pueblo Grant did not extinguish plintiff's [sic] title to the Gallegos Grant.

As discussed above, the Act of July 22, 1854, does not preclude the bringing of this suit for two reasons. First, plaintiff had perfect title under Spanish law, and was not obligated to submit its claim under the Diego Gallegos Grant to the Surveyor General. Second, although it did submit the claim, there is no evidence that the Surveyor General or Congress ever considered the claim to either confirm or reject it. *See Pinkerton v. LeDoux*, 129 U.S. 346 (1889).

> If Congress confirmed a title reported favorably by [the Surveyor General] it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title.

Id. at 352.

In 1891, Congress enacted a statute which established the Court of Private Land Claims, 26 Stat. 854 (1891). Under that statute, persons claiming land under title perfected prior to accession by the United States could obtain court confirmation of their titles. They were not

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*** Defendants' expert, John Baxter admits that no records of the Surveyor General or Congress reflect either allowance or disallowance of the Gallegos Grant. Affidavit of John O. Baxter ¶ 4.

required to do so. The validity of titles not adjudicated by the Court of Private Land Claims can be litigated elsewhere. *United States v. Conway*, 175 U.S. 60, 68 (1899); *United States v. Baca*, 184 U.S. 653, 658-660 (1902).****

Both parties submit that plaintiff included the Diego Gallegos Grant in their petition to the Court of Private Land Claims filed in 1893. Plaintiff also submitted a joint claim with the San Felipe Pueblo concerning a different grant. The Santo Domingo claims, Case No. 184, and the San Felipe claim, Case No. 185, were consolidated in Case No. 134. The Pueblos filed a Supplemental joint and several Amended Petition on June 20, 1898. The amended petition did not include the claim for the Diego Gallegos Grant. The parties were heard on the amended petition on June 23, 1898 and a Decree of Confirmation filed December 8, 1898. The proceedings and the Decree make clear that the only claim at issue before the Court was the joint claim. Thus, that litigation does not preclude plaintiff from bringing this suit, nor does it serve to extinguish plaintiff's title to the Gallegos Grant.

Defendants also point to the issuance of patents for the tracts of land at issue as extinguishing plaintiff's title under the Diego Gallegos Grant.***** Defendants derive

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**** Defendants' affirmative defense based on the enabling statute for the Court of Private Land Claims has been previously stricken. Memorandum Opinion at 3, August 17, 1984.

***** Defendants also claim that the creation of the Santa Fe National Forest or the orgainization [sic] of Grazing District No. 1 extinguished plaintiff's title. However, there is no evidence that the tracts of land at issue are located in or affected in any way by either the Forest or Grazing District.

their title from patents issued pursuant to the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392. Defendant's Response to Requests for Admissions ¶ 1.

It is well settled law that a patent is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so, and that the want of such title or authority can be shown in an action at law. *Knight v. U.S. Land Ass.*, 142 U.S. 161, 176 (1891). Thus, if land is not public property, or had previously been disposed of, or if Congress had made no provision for its sale, or had reserved it, there is no authority or jurisdiction to transfer such land, and its attempted conveyance would be inoperative and void. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 18 (1935). These general principles have been applied to void patents issued by the United States government to land claimed under Spanish land grants. *See Doolan v. Carr*, 125 U.S. 618 (1887); *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253 (1895).

Since the law is that patents from the United States government do not convey title which the government does not have, such patents would not ordinarily serve to extinguish title held by a Pueblo. By granting authority to issue patents, Congress did not grant authority to convey title to land which was not public land. Public land has specifically been defined to exclude land claimed under a Spanish or Mexican land grant even though not confirmed.

> [T]he status of land included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it, was such that

> the right of private property could not be impaired by a change of sovereignty, and . . . such lands were not included in the phrase "public lands" of these specific railroad grants, and . . . until such claims were finally decided to be invalid they were not restored to the body of public lands subject to be granted.

Doolan, supra, 125 U.S. at 632.

The Homestead Act of 1862 cannot be construed to otherwise contemplate the extinguishment of title held by a Pueblo rather than by a individual. Congressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied. *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 346 and 345 (1941); *Oneida Indian Nation v. County of Oneida,* 53 U.S.L.W. 4225, 4231 (Sup. Ct. March 4, 1985). The Homestead Act of May 20, 1862, by its own language applies only to "unappropriated public lands," and makes no reference to Indian lands.

No government action identified by defendants has extinguished plaintiff's title to the Gallegos Grant. Nor, as this court has previously held, does the defense of abandonment apply to title based on a specific grant. Thus, plaintiff has established its title to the Diego Gallegos Grant as a matter of law and the superiority of its title to that of defendants.

The one remaining question concerning plaintiff's second claim is the actual boundaries of the Diego Gallegos Grant. This is a factual issue, *Pinkerton v. Ledoux,* 129 U.S. 346 (1888) which is not properly decided on plaintiff's motion.

The boundaries of the Grant are established by description within the Grant documents and the Deed conveying the property to plaintiff. Plaintiff has not established that there is no genuine issue of material fact concerning the proper placement of these boundaries.

Where as here, the evidence bearing on a crucial issue of fact is in the form of expert opinion testimony, the granting of summary judgment is inappropriate unless the trier of fact would not be at liberty to disregard such testimony. *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970). This exception usually occurs in cases where there are questions of medical causation or other issues beyond the competence of lay determination.

Plaintiff's motion on this issue is based on the description in the title documents and expert opinion. Defendant has raised certain factual issues which might serve to impeach the experts' opinions as to the placement of the boundaries. This is sufficient to defeat plaintiff's motion in this instance.

If summary judgment is not granted upon the motion of a party, Federal Rules of Civil Procedure 56(d) allows for the court to determine what facts are nevertheless without substantial controversy. Such facts shall then be deemed established. Thus, partial summary judgment will be granted establishing that plaintiff has good title under the Diego Gallegos Grant, that such title has not been extinguished, and that plaintiff is not precluded from asserting its title in these proceeding. [sic] As to these issues, plaintiff has established that no genuine issue of material fact exists.

Defendants' motion to dismiss raises a question of election of remedies. Plaintiff has a case pending in the Court of Claims for damages against the United States. The tracts at issue in this case are also part of the property at issue in the Court of Claims. Although plaintiff's original complaint in the Court of Claims case asked for damages for breach of fiduciary duty in protecting plaintiff's property rights, plaintiff entered into a stipulation with the government several years ago stating that title to certain land had been extinguished.

It is defendants' contention that plaintiffs should be precluded from establishing title in this court and then recovering damages for extinguishment in the Court of Claims. Regardless of the merits of defendants' position, the record before this court indicates that defendants' motion is prematurely made. At this time, plaintiff would appear to be making a good faith effort to exclude the Diego Gallegos Grant from the stipulation. If plaintiff is successful, defendants' motion will be moot.

Now, Therefore,

IT IS BY THE COURT ORDERED that defendants' motion to dismiss is denied, but defendants' motion for leave to amend the answer will be granted and defendants shall file their amended answer within ten days of the entry of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted in part and the court finds that the following facts are without substantial controversy and are deemed established, (1) the Spanish Governor of New Mexico, with full authority made a land grant to Diego Gallegos in 1730; (2) Santo Domingo purchased

that Grant in 1748 from Gallegos' widow, (3) Santo Domingo's ownership of the Gallegos Grant was recognized by Spanish officials and Santo Domingo neither sold nor was divested of the Grant prior to the Treaty of Guadalupe Hidalgo; (4) Santo Domingo has not been divested of title since the Treaty of Guadalupe Hidalgo by extinguishment or abandonment nor have any other actions or failures to act by Santo Domingo otherwise precluded the Pueblo from claiming title based on the Grant; and (5) the Raels' title to the property at issue in this cause is based on homestead patents issued in the 1930s and 1940s pursuant to the Homestead Act of May 20, 1862.

/s/ Howard Bratton
Chief Judge

APPENDIX D

(July 10, 1985)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO,

Plaintiff,

vs.

CIV NO.
83-1888 HB

ARNOLD J. RAEL, et al.

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion to strike jury demand and defendants' motion to dismiss. The court having considered the motions and been apprised of the applicable authorities concludes that neither motion is well taken and both should be denied.

Plaintiff Pueblo of Santo Domingo, an Indian tribe formally recognized by the United States, seeks to quiet title to land also claimed by the defendants. The Pueblo claims both aboriginal title and title in fee simple derived from a purchase in 1748 of the Gallegos Land Grant. Defendants trace their chain of title to patents issued by the United States in the late 1930's.

The action was originally brought to quiet title and for damages. The plaintiff's damage claims have been voluntarily dismissed, leaving only a suit for quiet title.

Jury Demand

Defendants have made a timely jury demand. However, a suit to quiet title is normally an equitable action for which there is no right to a jury trial under the Seventh Amendment. *Meeker v. Ambassador Oil Co.*, 308 F.2d 875 (10th Cir. 1962), *reversed*, 375 U.S. 160 (1963). An exception to this general principle exists in the event the plaintiff has an adequate remedy at law. A plaintiff out of possession may not bring a quiet title action in federal court against a defendant in possession since an action in ejectment is available. *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 84 (1927). In such a case defendant has a constitutional right to a jury trial.

In the present action ejectment affords plaintiff an adequate and complete remedy at law. At the hearing on this motion, the evidence introduced leads to a finding that defendants are in possession of the property. Defendants' predecessors built structures on the property including residences. Although defendants do not reside on the property and have not for some time, they have utilized the property until recently to a limited extent and have retained sufficient contact with the property and displayed sufficient indicia of present possession and ownership such that actual possession has been maintained. Thus, plaintiff's motion to strike jury demand will be denied.

Motion to Dismiss

Defendants' motion to dismiss is stated to be a motion to dismiss for lack of subject matter jurisdiction. However, most of defendants' grounds for dismissal are

not jurisdictional. Plaintiff responded to the motion on its merits and submitted exhibits with their response. Accordingly, the court informed the parties that the motion would be treated as a summary judgment motion and the parties were given time to submit any additional exhibits. The motion is now properly before the court partly as a motion to dismiss under Rule 12(b)(1) and partly as a summary judgment motion.

Abandonment

Defendants contend that the Pueblo of Santo Domingo has abandoned any claims to the property in dispute. Abandonment is a proper defense to a claim based on aboriginal title. *Williams v. City of Chicago*, 242 U.S. 434 (1917). However, there is a genuine issue of material fact concerning the issue of abandonment. Furthermore, abandonment is not a defense to the Pueblo's alleged Gallegos Land Grant claim to the property. *See* Cohen, *Handbook of Federal Indian Law* 492-93 (1982 ed.).

Res Judicata and Collateral Estoppel

Defendants contend that this action is barred by principles of res judicata and/or collateral estoppel. As plaintiff correctly points out, these doctrines are not applicable in this instance.

Plaintiff filed a claim under the Indian Court of Claims Act in 1951 which encompasses the land here in question. Plaintiff's petition asserted that the government was liable for damages for allowing others to interfere with the Pueblo's possessory rights to its lands. In 1969,

however, the Pueblo's attorneys and the United States filed a stipulation stating that the Pueblo had established aboriginal title to an area identified on n [sic] attached map and that the United States was liable for extinguishing plaintiff's Indian title to the area. *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct.Cl.), *cert.denied*, 456 U.S. 1006 (1981). The parties then submitted briefs on the question of the date of "taking" for purposes of valuing the land. The Indian Claims Commission adopted the dates proposed by the Pueblo and the Court of Claims affirmed on interlocutory appeal. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975). Subsequently in 1980, plaintiff attempted to vacate its stipulation and the decision establishing the taking dates. The Court of Claims which had inherited the case at the expiration of the Indian Claims Commission's term in 1978 denied the motion. *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct.Cl. 1981), *cert.denied*, 456 U.S. 1006 (1981). The case is still pending in the Court of Claims.

Collateral estoppel or issue preclusion precludes relitigation of issues actually litigated and determined in a prior lawsuit. *Lujan v. United States Dept. of the Interior*, 673 F.2d 1165 (10th Cir. 1982). In the present case, defendants assert that plaintiff is precluded from litigating the issue of whether its title has been extinguished by the United States. However, the issue of extinguishment was never actually litigated by the plaintiff and the United States. Rather, the fact of extinguishment was stipulated to by the parties. "An issue is not actually litigated if . . . it is the subject of a stipulation between the parties." Restatement (Second) of Judgments § 27 comment e (1982).

Res Judicata is also unavailing. The doctrine of claim preclusion insures the finality of decision and avoids repetitive suits between the same parties over the same cause of action. The rule states that a final judgment of a court of competent jurisdiction upon the merits concludes the parties to the litigation and constitutes a bar to a new action or suit upon the same cause of action. *Henderson v. United States Radiator Corp.*, 78 F.2d 674 (10th Cir. 1935). The parties are bound as to every matter which was actually litigated as well as to those which could have been litigated. *Katzburg v. Krebs*, 545 F.2d 104 (10th Cir. 1976).

The Indian Claims Commission Act contains its own applicable preclusion doctrine. 25 U.S.C. §70u provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

United States v. Dann, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds*, 53 U.S.L.W. 4169 (1985) holds that this section pre-empts common law preclusion rules for

purposes of claims made under the Act, and embody the sum total of the preclusive effect of such claims. However, this court need not reach this pre-emption question since under either doctrine plaintiffs are not precluded from bringing the present action.

The Court of Claims has not rendered a final determination as required by the terms of 25 U.S.C. §70u. Nor has payment been made to the Pueblo. *See United States v. Dann*, 53 U.S.L.W. 4169 (Sup. Ct. Feb.20, 1985).

Res judicata also requires a final judgment on the merits in the prior action before a second suit is precluded. No final judgment has been rendered by the Court of Claims regarding this matter.

Judicial Estoppel

Defendants argue that judicial estoppel bars plaintiff from contesting extinguishment of aboriginal title. Judicial estoppel is a doctrine that bars a party from asserting a position in litigation inconsistent with that asserted successfully in prior litigation with respect to the same facts. *Himel v. Continental Illinois National Bank and Trust Co. of Chicago*, 596 F.2d 205 (7th Cir. 1979). The doctrine's function is to protect the integrity of the courts and the judicial process. *United Virginia Bank v. B.F. Saul Real Estate Investment Trust*, 641 F.2d 185 (4th Cir. 1981).

> Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted that party's inconsistent position, then at least one court has probably been misled.

Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982). Thus, the rule cannot be applied in a subsequent proceeding unless a party has been successful in asserting an inconsistent position in a prior proceeding. *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980). If a settlement is reached in the prior litigation, then the position can not be viewed as having been successfully asserted and the integrity of the judicial process is unaffected since there is no perception that either the first or the second court was mislead.

> A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus settlement does not provide the prior success necessary for judicial estoppel.

Id. at 939; *City of Kingsport v. Steel & Roof Structures, Inc.*, 500 F.2d 617, 620 (6th Cir. 1974).

The stipulation in the present case appears to be much like a settlement under the principles of judicial estoppel. *See Edwards, supra* (reliance on a rebuttable presumption which is never contested in the first proceeding does not preclude relying on an inconsistent position in a second proceeding). The Court of Claims did not have to decide to accept the position that the Pueblo's aboriginal title was extinguished since the parties stipulated to that fact. Nor can it be said that plaintiff was successful in the first action since the first action is still pending.

Indian Claims Commission Act

Defendants assert that Congress deprived the district court of subject matter jurisdiction over this case by enacting the Indian Claims Commission Act (ICCA), 60

Stat. 1049 (1946). Defendants contend that the Act provides the exclusive remedy in this case, and serves as a bar to this court affording any other form of relief to the Pueblo. Defendants rely on *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Oglala Sioux Tribe v. Homestead Mining Co.*, 722 F.2d 1407 (8th Cir. 1983); and *Navajo Tribe v. State of New Mexico*, Civil No. 82-1148-JB, slip op. (D.N.M. Jan.23, 1984). Those two cases are distinguishable and not controlling.

Both of those cases involved suits by which an Indian Tribe sought to challenge some act of the United States in assuming title to property which was taken from the Tribe by the United States. In such a case, both courts held that the United States was an indispensable party and that the district court did not have jurisdiction over such claims against the United States because of the exclusive remedy contained in the ICCA. The bar applies even though the suit is brought against private parties who derive their title from the United States. This holding is premised on the principle that "an instrument may not be cancelled by a court unless the parties to the instrument are before the Court." *Tewa Tesuque v. Morton*, 360 F.Supp. 452 (D.N.M. 1973), *aff'd*, 498 F.2d 240 (10th Cir. 1974). "As a matter of federal law, it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1977). In both cases, the Tribe's success depended on attacking the validity of patents issued subsequent to an

allegedly unlawful taking from the Tribe by the federal government.

In the case at bar the United States is not an indispensable party. Plaintiff is not seeking to cancel or challenge the validity of the patents issued to the defendants by the United States government. Plaintiff is asserting that it has prior and therefore better title than defendants. Plaintiff's claim does not depend on invalidating any action of the federal government. The Indian Claims Commission Act does not bar the present action.

Now, Therefore,

IT IS BY THE COURT ORDERED that defendant's motion to dismiss is denied and plaintiff's motion to strike jury demand is denied.

/s/ Howard Bratton
Chief Judge

APPENDIX E

(August 16, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO, and the UNITED STATES OF AMERICA ex rel., PUEBLO OF SANTO DOMINGO,

CIV NO. 83-1888 HB

Plaintiffs,

vs.

ARNOLD J. RAEL, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion to strike affirmative defenses and for partial judgment on the pleadings. Having considered the authorities, the arguments of the parties and the entire record, the court concludes that the motion has merit and should be granted.

Plaintiff Pueblo of Santo Domingo, an Indian tribe formally recognized by the United States, seeks to quiet title to land also claimed by the defendants. The Pueblo claims both aboriginal title and title in fee simple derived from purchase in 1748 of the Gallegos Land Grant made by the Spanish government. Defendants' chain of title derives from patents issued by the United States in the late 1930's. The Pueblo also seeks damages for defendants' alleged trespass.

The first affirmative defense asserts that the court lacks subject matter jurisdiction. The existence *vel non* of Indian title, whether aboriginal or fee simple, is a matter of federal law, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), therefore, 28 U.S.C. §1362 confers subject matter jurisdiction on this court. Although it could be argued that Congress deprived the court of jurisdiction by enacting the Indian Claims Commission Act, 60 Stat. 1049 (1946) codified at 25 U.S.C. §§70 *et seq.* (1976), as the Pueblo's exclusive remedy, defendants apparently wish to preserve this argument for subsequent motions.

Affirmative defenses II, III, VI, and VIII assert defenses of laches, estoppel, limitations of action and adverse possession. Insofar as these defenses are based on state law, they are inapplicable to the determination of Indian title to land. The Indian Nonintercourse Act, 25 U.S.C. §177, preempts state law defenses by invalidating transfers of Indian land which do not comply with the statutory requirements. *Begay v. Albers*, 721 F.2d 1274, 1279-1281 (10th Cir. 1983); *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.*, No. 83-1220 (10th Cir. May 14, 1984); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 804-805 (D.R.I. 1976).

By their fifth affirmative defense, defendants seem to assert that the United States, other Pueblos and certain private individuals are indispensable parties because they too claim title to land which was once part of the Gallegos Grant. None of these neighboring landowners claim an interest in the land here in dispute. While they may be interested in the outcome of this litigation, they

are not for that reason indispensable parties hereto. *Walton v. United States*, 415 F.2d 121 (10th Cir. 1969). Nor is the United States an indispensable party simply because this is an Indian land suit. The Pueblo may sue to quiet title without joining the United States. *Choctaw and Chickasaw Nation v. Seitz*, 193 F.2d 456 (10th Cir. 1951).

The seventh affirmative defense alleges that the Pueblo's claims are barred by the Act which established the Court of Private Land Claims, 26 Stat. 854 (1981). Under that statute, persons claiming land under title perfected prior to accession by the United States could obtain court confirmation of their titles. They were not required to do so. The validity of titles not adjudicated by the Court of Private Land Claims can be litigated elsewhere. *United States v. Conway*, 175 U.S. 60 (1899); *United States v. Baca*, 184 U.S. 653, 658-660 (1902).

The fourth affirmative defense asserts that the Complaint fails to state a cause of action for which relief can be granted. Defendants have presented no viable arguments in support of this defense. The Complaint is clearly sufficient and states claims which, if proven, can be remedied. Defendants have not opposed the Pueblo's motion insofar as it seeks to strike the ninth defense.

Now, therefore,

IT IS BY THE COURT ORDERED that plaintiff's motion to strike affirmative defenses and for partial judgment on the pleadings is granted. Insofar as they assert defenses based on state law, affirmative defenses II, III, VI and VIII are stricken; judgment on the pleadings in favor of plaintiff is granted as to affirmative defenses I, IV, V, VII and IX.

/s/ Howard Bratton
Chief Judge

APPENDIX F

(September 4, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO,

Plaintiff,

v.

Civ. No.
83-1888-HB

ARNOLD RAEL, et al.,
Defendants.

JUDGMENT

This court having granted partial summary judgment to plaintiff Pueblo of Santo Domingo on certain issues raised by the Second Claim of plaintiff's Amended complaint, herein, and the balance of the issues raised by such claim having been tried to a jury on August 5-8, 1986, and the jury having duly rendered a verdict for the plaintiff Pueblo of Santo Domingo, on such claim, it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff, Pueblo of Santo Domingo, shall have judgment against the defendants, Arnold Rael, Sophia Rael, Serafin Rael, Lionel E. Rael, Jose Ivan Rael, Henry J. Rael and Jerry C. Rael, as follows:

1. Plaintiff Pueblo of Santo Domingo is adjudged to have good and indefeasible fee title, by virtue of its ownership of the Diego Gallegos Grant, in and to three parcels of land situated in Sandoval County, New Mexico, more particularly described as follows:

> Lots 1, 2, 3 and 4 and the north half of the south half of Section 31, T. 17 N., R. 5 E., NMPM, consisting of approximately 319.72 acres, more or less; and all of Section 6 and the west half of Section 7, T. 16 N., R. 5 E., NMPM,

consisting of approximately 960 acres, more or less;

2. Defendants Arnold Rael, et al., their agents, assigns, heirs and successors in interest should be and they are hereby permanently ejected from the above-described tracts of land; and

3. Plaintiff Pueblo of Santo Domingo shall recover its costs in this action from defendants Arnold Rael, et al. as allowed by law; and it is further

ORDERED, that the First Claim of plaintiff's complaint is dismissed without prejudice.

/s/ Howard Bratton
United States District Judge

Approved as to form:

/s/ Scott E. Borg
Attorney for Plaintiff

Approved per phone conversation - 9/3/86
Attorney for Defendants

APPENDIX G

(August 8, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO

Plaintiff,

vs.

CV No.
83-1888 HB

ARNOLD J. RAEL, SOPHIA RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY J. RAEL, and JERRY RAEL,

Defendants.

VERDICT

Do you find that the Rael tracts (Tracts A, B and C) are inside or outside the boundaries of the Diego Gallegos Grant?

Inside X
Outside ____

/s/ Ronald J. Childress
Foreperson

APPENDIX H

(August 8, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO
Plaintiff

vs.

ARNOLD J. RAEL, SOPHIA RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY J. RAEL, and JERRY RAEL,
Defendants.

CV No. 83-1888 HB

COURT'S INSTRUCTIONS TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

This case is a dispute over ownership of land. The Raels, the defendants, claim three tracts of land under Homestead patents issued by the United States government in the late 1930s and early 1940s. The Pueblo of

Santo Domingo, the plaintiff claims the three tracts of land under a Spanish land grant known as the Diego Gallegos Grant.

In a civil action such as this involving an Indian claim to land, if the plaintiff makes out a "*prima facie* case" of either previous possession or ownership of the land in dispute, the burden of proof shifts to the defendants. They must put on evidence sufficient to overcome plaintiff's claims. A *prima facie* case means evidence sufficient, by itself, to support a verdict. I instruct you that based upon the evidence introduced during this trial plaintiff has made out a *prima facie* case of ownership to the lands at issue here.

Therefore, the defendants have the burden of disproving plaintiff's claim by a "preponderance of the evidence." A preponderance of the evidence means that the defendants have to produce such evidence as, when considered and compared with the plaintiff's evidence, has more convincing force and produces in your minds a belief that what defendants claim is more likely true than not true. In determining whether any fact in issue has been proved or disproved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the defendants fail to meet their burden your verdict must be for the plaintiff.

Prior to trial I ruled as a matter of law on several issues about the Diego Gallegos Grant. You are instructed that in your deliberations you are to accept certain facts as true. These facts are:

(1) On January 31, 1730, Spanish Governor Juan Domingo de Bustamante validly granted to Diego Gallegos a tract of land in New Mexico;

(2) On November 28, 1748, the Pueblo of Santo Domingo bought the Diego Gallegos Grant from Gallegos' widow;

(3) Spanish authorities repeatedly recognized Santo Domingo's title to the Diego Gallegos Grant;

(4) The United States has not divested the Pueblo of Santo Domingo of its title to the Diego Gallegos Grant, and Santo Domingo has full title to the Diego Gallegos Grant today.

(5) The defendants' title to the property at issue is based on Homestead Patents issued by the United States in the 1930s and 1940s.

The Pueblo of Santo Domingo claims that the disputed land is completely inside of the boundaries of the Diego Gallegos Grant. The Raels claim that the disputed land is not inside the Diego Gallegos Grant. The sole issue for you to decide regarding the Diego Gallegos Grant is thus whether the disputed land is inside or outside of the Grant's boundaries. If it is located in the Grant, then your verdict is for plaintiff because its title, being older, is superior to the claimed title of the defendants. If you find that the disputed land is located outside of the Grant, then your verdict is for the defendants.

The plaintiff's evidence, as I have instructed you already, has made out a *prima facie* case of ownership of the disputed land. It is therefore the defendant's burden to prove that the disputed parcels are not within the

Gallegos Grant. To sustain their burden on this issue, it is not enough for defendants to raise mere questions or doubts about the correctness of plaintiff's contentions as to the grant boundaries. Rather, defendants must affirmatively prove that the grant boundaries are not where plaintiff contends, and that, correctly located, they do not include the disputed parcels.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist you in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

APPENDIX I

(October 11, 1985)

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In support of this motion, plaintiff relies upon the following material facts as to which there is no genuine issue. (Each fact is followed by a parenthetical citation to those portions of the record where it is established.)

1. On January 13, 1730, Governor Juan Domingo de Bustamante, then Spanish governor of New Mexico, granted to Diego Gallegos, a citizen of the province, a tract of land situated west of the Rio Grande, whose boundaries were described as being on the north the Old Pueblo of Cochiti which is in the *sierra*; on the south by a spring of water which is in the canyon that runs down to the little house known as that of Cubero; on the west by the road which runs from Jemez to San Felipe; on the east by the lands of Santo Domingo. Gallegos was placed in juridical possession of the tract by Andres Montoya, Alcalde of the Keres jurisdiction. (Jenkins Exhibit 2 at 1-2; Jenkins Exhibits 3, 4; Defendant's Responses to Plaintiff's First Request for Admission (hereinafter, "First Request"), No. 9).

2. On November 28, 1748, Maria Josefa Gutierrez, widow of Diego Gallegos, and her children, deeded the Gallegos Grant to the Pueblo of Santo Domingo for 400 pesos, by deed executed before Keres Alcade Juan Vigil. (Jenkins Exhibit 2, at 4; Jenkins Exhibits 3, 4; First Request, No. 10.).

3. On at least two occasions after 1748, Santo Domingo's title to the Gallegos Grant was investigated, confirmed, and protected by the Spanish authorities. One occasion was in 1768, in conjunction with the making of the Ojo de Borrego Grant to Nerio Antoino Montoya, which grant was said to be bounded on the east by "the lands which the Indians of the Pueblo of Santo Domingo purchased" from the widow of Diego Gallegos. The other was in 1815, when Santo Domingo protested the Santa Rosa de Cubero Grant on grounds of possible encroachment on the Gallegos Grant, but investigation confirmed that the Gallegos Grant south boundary was north of the Cubero Grant. (Jenkins Exhibit 2 at 7-11, 16-20; Jenkins Exhibits 6, 8).

4. There is no record of any action by Spanish or Mexican authorities up to the American invasion in 1846 indicating any defect in or loss of Santo Domingo's title to the Gallegos Grant. (Jenkins Exhibit 2 at 13-25).

5. Members of Santo Domingo Pueblo have continuously used and occupied the Gallegos Grant lands from prehistoric times up to the present day, for hunting, gathering, religious, and other purposes. (Ellis Affidavit, Paragraph 6; Ellis Exhibit 22 *passim*).

6. The Gallegos Grant has never been rejected by the Surveyor General, Congress, or the Court of Private Land Claims, or any other federal official or agency. (Jenkins Exhibit 2 at 61).

7. The property at issue in this case is located entirely within the boundaries of the Gallegos Grant. (Jenkins Exhibit 2 at 62-66; Ellis Exhibit 23, *passim*; Ellis Affidavit, Paragraph 7; Ortiz Exhibit 18, *passim*; Ortiz

Exhibit 19; Ortiz Exhibit 20, Ortiz Affidavit, Paragraph 5; Snow Affidavit, Paragraphs 2-6).

8. Defendants' claims to the property at issue in this case derive solely from patents issued by the United States in the 1930s and 1940s under the Homestead laws. (First Request, Nos. 1,2).

APPENDIX J

(October 11, 1985)

(Caption omitted in printing)

AFFIDAVIT OF DR. MYRA ELLEN JENKINS

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

MYRA ELLEN JENKINS, of 1022 Don Cubero, Santa Fe, New Mexico, being first duly sworn, hereby deposes and says:

1. I am a professional historian, specializing in the history of New Mexico during the Spanish, and Mexican Territorial periods. I received a B.A. (cum laude) (1937) and M.A. (1938) in history from the University of Colorado, and a Ph.D. from the University of New Mexico in 1953.

2. My career as an historian, and a selection of my numerous publications, are set forth in my current resume, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference. Among what I regard as the more significant achievements in my career was my organization of the Archives Division of the State of New Mexico Records Center and Archives as the depository for the many public records of the Spanish and Mexican periods, after the establishment of the agency in 1960, and my association with the Records Center until my retirement in 1980. I served under various titles during that period, in all of which capacities I was in charge

of overseeing the Spanish, Mexican and Territorial archives. I also organized the records, directed their microfilming and published guides to all three categories. From 1969 to 1980, moreover, I held the title of State Historian of New Mexico.

3. My work as an historian and archivist has given me considerable familiarity with the Spanish and Mexican archives of New Mexico. I am fluent in Spanish and an expert in paleography, and have extensive experience translating 17th to 19th century Spanish documents. I have also become very familiar with the handwriting, styles of expression and biographical facts concerning many of the government officials in New Mexico from the late 1600s until the period of United States sovereignty.

4. A particular focus of my work has been research involving titles to land, especially land grants, and I have studied the original documents of most of the land grants made in New Mexico. These include documents in the Spanish and Mexican archives, in the files of the Surveyor General of New Mexico, and in the records of the Court of Private Land Claims, as well as in some private collections. I have frequently been called upon to testify as an expert on the historical facts concerning land grants in a variety of contexts.

5. I have also spent a considerable amount of time researching the treatment of the lands of the Pueblo Indians of New Mexico, under the Spanish, Mexican and American administrations, as these groups have occupied a unique status, and have had special problems, through all three periods. Much of my writing and testimony has been on Pueblo history and land issues.

6. In the spring of 1984, I was asked by attorneys for the Pueblo of Santo Domingo to investigate the Diego Gallegos Grant, a Spanish land grant made to Diego Gallegos by Governor Juan Domingo de Bustamante in 1730, and sold by Gallegos' widow to the Pueblo of Santo Domingo in 1748. The results of my investigation are fully set out in the attached report, "Title of the Pueblo of Santo Domingo to the Diego Gallegos Land Grant," Exhibit 2 to this affidavit, which is incorporated herein by reference. I was quite surprised to discover the relative wealth of documentation of this grant, and Santo Domingo's title thereto, in obviously authentic original documents on file in the New Mexico Records Center: surprised, because despite Santo Domingo's repeated efforts to have its title to the grant recognized by the United States government, the significance of the documents had simply been ignored for the past 130 years.

7. I located the original 1748 deed showing Santo Domingo's purchase of the Gallegos Grant in the files of the Surveyor General of New Mexico, which is in the custody of the Records Center, along with a 1745 certified copy of the grant documents. Copies of these documents, certified by the Records Center, are attached hereto as Exhibit 3. The Surveyor General's files also contain a certified copy of the grant and sale documents made at Santo Domingo's request in 1791, by Antonio Armenta, Alcalde Mayor of the Keres Jurisdiction. A certified copy of this document is attached as Exhibit 4. All these documents were turned over to the Surveyor General by Santo Domingo in 1856 and have been in these files ever since. I also located another copy of the grant and sale documents, in the Spanish Archives of New Mexico, Series I

document number 1346. A certified copy of this document is attached as Exhibit 5. The fact that identical copies of the same set of documents turned up both in the official Spanish archives and in the hands of the Pueblo lends considerable support to my opinion that the documents are completely authentic.

8. There is no doubt in my mind that the Gallegos Grant was a valid Spanish grant, and that Spanish authorities recognized and affirmed Santo Domingo's title to the grant, from the purchase in 1748 up through the end of Spanish sovereignty in New Mexico. Three other groups of documents located in the Spanish Archives of New Mexico (all discussed in my report, Exhibit 2) plainly establish this. One is the proceedings concerning the making of the Ojo de Borrego Grant in 1768, certified copies of which (with my translations) are attached as Exhibit 6. The second is an 1808 letter from Father Antonio Cavallero to Governor Alberto Maynez, a certified copy of which is attached as Exhibit 7. The third is the record of the investigation leading up to the making of the Santa Rosa de Cubero Grant in 1815, certified copies of which are attached as Exhibit 8. Each of these documents adds to the evidence of the Grant's boundaries, and they convincingly show that Santo Domingo's title to the Grant was fully recognized by the Spanish authorities.

9. There is no evidence of any conflicting grants or other divestiture of Santo Domingo's title to the Gallegos Grant at any time. I would say, in fact, that Santo Domingo's ownership of the Gallegos Grant is better documented than is virtually any other title acquired under the Spanish period in New Mexico with which I am

familiar. Further, as explained in my report, the boundaries of the grant are very clearly set out, and are corroborated by subsequent investigation and documentation during the Spanish period. I feel confident that the boundaries described in my report are those that were recognized by the Spanish authorities.

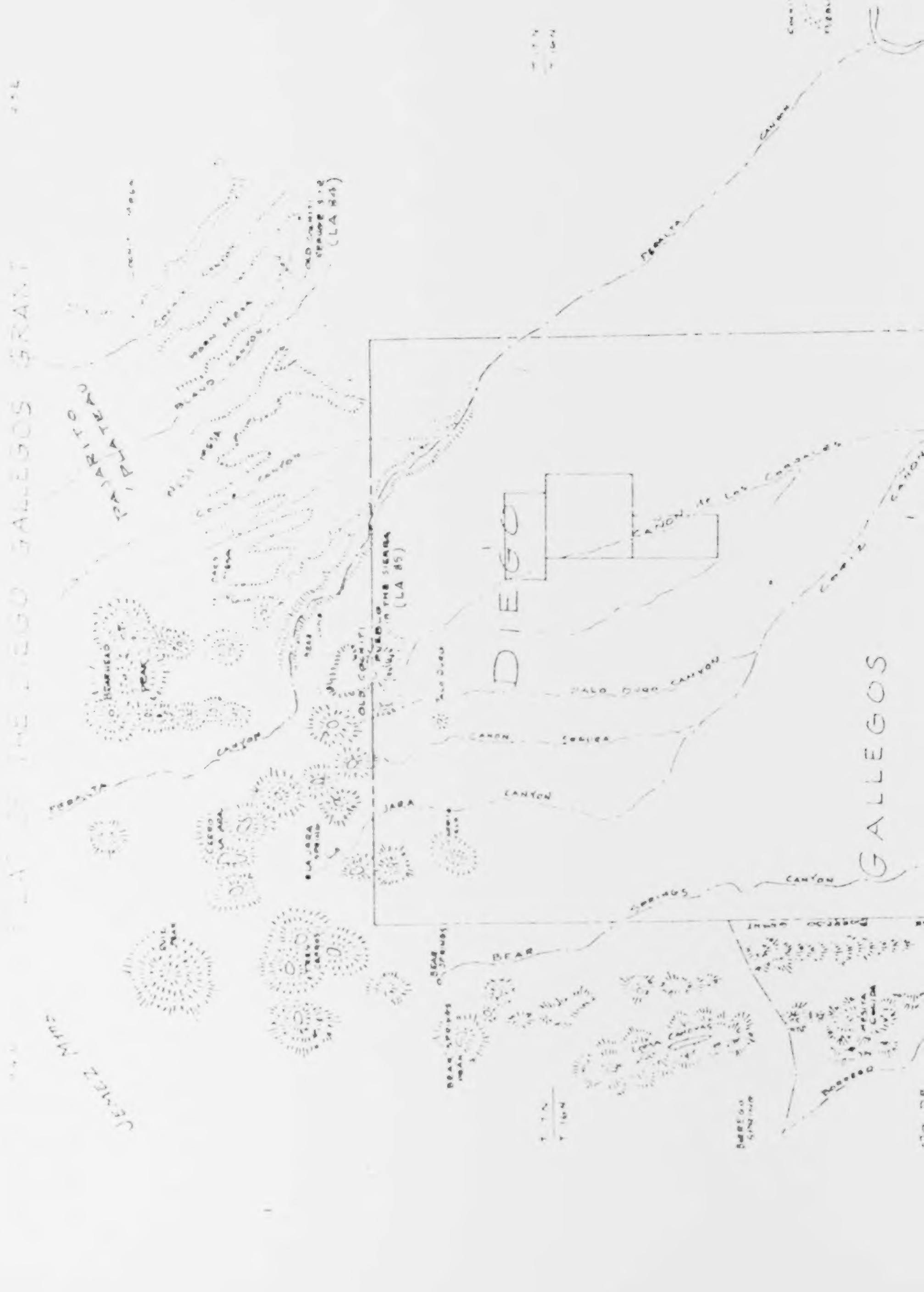
10. Attached hereto as Exhibit 9, and incorporated herein by reference, is another paper I prepared in connection with this project, entitled "A History of Pueblo Indian Land Administration and Tenure." This paper, based in part on investigation and research I have performed over the years, and in part on work done more recently with specific reference to Santo Domingo, documents the treatment of Pueblo Indian land matters under Spanish, Mexican and United States sovereignty. Although the laws of all three sovereigns gave special protection to Pueblo lands, United States officials were considerably less attentive to Pueblo concerns than were their predecessors. The United States' failure to deal with the Gallegos Grant is characteristic of its poor record of protecting Pueblo land titles generally.

/s/ Myra Ellen Jenkins

Subscribed and sworn to before me this 7th day of October, 1985.

/s/ Notary Public

My commission expires:
10/05/88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JARA
CANYON
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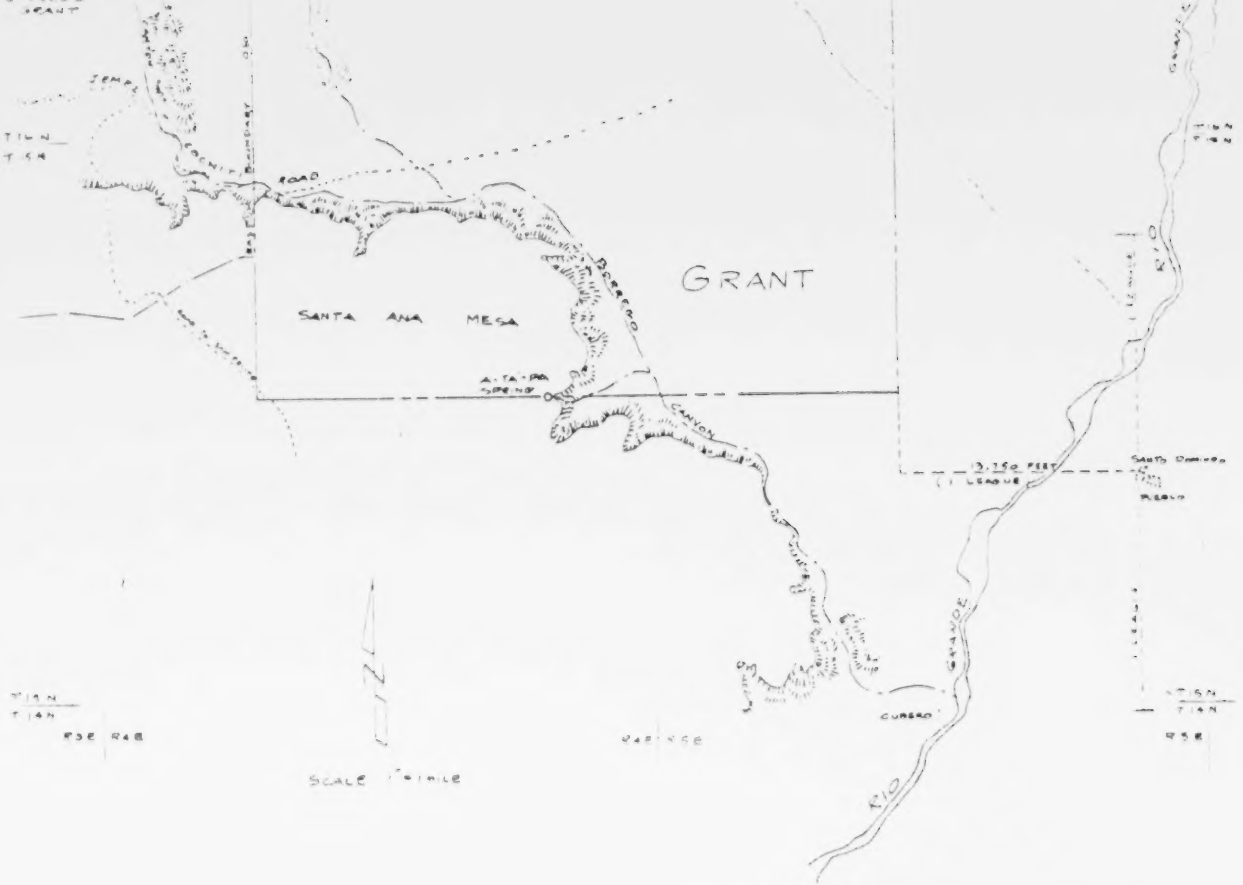

This plat was made from [illegible] Canada, Santo Domingo SW, Bond Springs Peak and Loma Creston, also from witness testimonials and official government documents located in public archives and field investigations.

Earl P. Ortiz

Earl P. Ortiz, Land Surveyor
Real Property Management
Southern Pueblos Agency
Bureau of Indian Affairs
July 8, 1985

From Exhibit 2 to Affidavit of
Dr. Myra Ellen Jenkins,
Pages i-ii

Important Dates in the History of the Diego Gallegos Grant

1598	Juan de Oñate establishes first Spanish settlement in New Mexico
1680-1692	Pueblo Revolt – Spaniards forced out of New Mexico
1693	Reconquest by General Don Diego de Vargas – Cochitís flee to LA 84
1696	Second revolt of the Pueblos – Cochitís flee northwest to sierra and canyons
1704	Alonzo Rael de Aguilar makes first measurement of the Pueblo league
1722	First measurement of Santo Domingo north league boundary; by Rael de Aguilar
1730	GRANT TO DIEGO GALLEGOS OF LAND WEST OF SANTO DOMINGO AND COCHITI
1748	PURCHASE OF DIEGO GALLEGOS GRANT BY SANTO DOMINGO
1768	Ojo de Borrego Grant to Borrego Spring area, establishing the Diego Gallegos Grant as the east boundary
1770	Joint grant to Santo Domingo and San Felipe for lands outside their league boundaries
1791	Certified copies of Diego Gallegos Grant documents made by Alcalde Mayor Antonio Armenta
1808	Letter from Fray Antonio Cavallero of Cochití to Governor Alberto Maynez informing him

	of Santo Domingo ownership of Gallegos Grant and its location
1815	Proceedings concerning Santa Rosa de Cubero Grant; southern boundary of Diego Gallegos Grant protected
1821-1846	Mexican independence from Spain – Santo Domingo 4-square league measured repeatedly
1846	Occupation of New Mexico by Brig. Gen. Stephen Watts Kearny for U.S.
1848	Treaty of Guadalupe Hidalgo – New Mexico ceded to United States
1856	Documents concerning Diego Gallegos Grant submitted to Surveyor General, filed, and ignored
1893	Claim filed in Court of Private Land Claims for Diego Gallegos Grant, but then deleted by attorney for Santo Domingo
1894-1896	Miners trespass on northern area of Diego Gallegos Grant and are challenged by Santo Domingo
1904-1907	Santo Domingo requests investigation of its boundaries
1936	Soil Conservation Service fences Santo Domingo livestock out of northern area of Diego Gallegos Grant
1936	Santo Domingo delegation requests congressional assistance in restoring Spanish grant lands, for which it has the deeds
1937	Santo Domingo submits copies of Diego Gallegos Grant documents to Superintendent Sophie Arberle for assistance in restoring boundaries; documents translated in Washington, but ignored

1951 Santo Domingo files suit against United States alleging failure to assert Pueblo's ownership of lands

1983 Diego Gallegos Grant documents relocated in Surveyor General records at State Record Center and Archives in Santa Fe

[*Translations of Spanish Documents, Exhibits 3-8 to Affidavit of Dr. Myra Ellen Jenkins*]

PUEBLO OF SANTO DOMINGO
Surveyor General Case No. H
State Records Center and Archives

Exhibit A, *Diego Gallegos Grant and Sale* (Exhibit C in the same case is a certified copy of this document and has a few minor changes as noted in parentheses)

Translation by Myra Ellen Jenkins

In the Pueblo of Santo Domingo on the 28th day of the month of November in the year 1748, before me, the Captain Juan Bejil (Vigil) Alcalde Mayor and War Captain of the said pueblo and its jurisdiction, appeared María Josepha Gutiérres, widow of Diego Gallegos, and all their children jointly, whom I certify that I know, and they said that they gave and did give in royal sale to the sons of the said Pueblo of Santo Domingo a piece of land which is bounded by the lands of the said pueblo, which lands the said Diego Gallegos, now deceased, held by royal grant, as is evident by the grant they have which they give to the said sons [of the pueblo] by this royal sale for their better protection, whose boundaries are: on the part of the north, the old Pueblo of Cochití, which is in the sierra; on the south, a spring of water which is in the cañada that runs down to a little house known as that of Cubero;

on the east (corrected in 1791 copy to west) by the road which runs from Jémez to San Felipe; on the west (corrected to east in 1791) with the lands of the said pueblo, which they sold to the aforesaid sons [of the pueblo] for the price and amount of 400 pesos, which they confess that they have received to their complete satisfaction and contentment, with which they remain contented and satisfied and that if it should be worth more, they make a grant and donation, pure, mere, perfect and irrevocable which the law calls *intervivos*, concerning which they renounce the laws of *non numerata pecunia*, proof and payment, those of *duobus res debendit* and *autentica prefide iusorebus* those of the community which speak concerning half of the just price, and that they [the Gallegos'] give them free of tax, tribute and other encumbrance, so that they [the sons of the pueblo] can enjoy them with free, liberal and general administration, and that they cede and convey to the said sons [of the pueblo] the property, right, control and dominion they hold to the said lands, concerning which neither the said María Josepha Gutiérres nor her children, heirs and successors shall bring any suit nor demand, and that in case they should bring such they shall not be heard in judgment or outside it, and that they will come to its complete defense until they are placed in quiet and peaceful possession. They empower the royal justices of his majesty, and in particular those of this kingdom, so that with all the force of law they may compel and hold them [the Gallegos'] to compliance with this writing as though it were by the definitive sentence of a competent judge passed down by authority for the matter adjudged. In order to guarantee this, they obligate their persons and their goods which

they have and may have. They renounce the ancient law *fecha nombala*, their own right, domicile and residence; the law *sicombenerit de iuridisione*, together with the general [provision] of law, and everything else which speaks in their favor and defense, of which they will not avail themselves. All this she contracted before me and the witnesses of my assistance so that I could place my decree and judicial authority. The contractors did not sign because they stated that they did not know how. I, the said alcalde mayor signed it with the witnesses of my assistance, acting as *jues receptor* due to the well known lack of a public or royal scribe for there is no one of this profession in this kingdom, dated in the said pueblo, the said day, month and year to all of which I certify as above.

Juan Vejil [sic] (rubric) Witnesses (Vigil in 1771 copy) Gregorio Garduño (rubric) (rubric) Manuel Belasques (rubric)

Señor Governor and Captain General

Diego Gallegos, resident of Bernalillo, appear before the greatness of Your Excellency in the best form for which there is a place for me and I say: that whereas I find myself lacking in lands and having an increasing family, for this reason it is necessary for me to find a piece of land in order to plant and from its fruits maintain my obligations. For this reason I have registered a piece of land which is to the right of Santo Domingo on the other bank [of the river], (opposite Santo Domingo in 1791 copy), and its boundaries are: on the north by the old Pueblo of Cochití which is in the sierra; on the south by a spring of water which is in the cañada that runs down to the little house known as that of Cubero; on the east (*west* in 1791 copy) by the road which runs from

Jémez to San Felipe; on the west (*east* in 1791 copy) by the land of Santo Domingo. I ask and petition for the said piece of land, submitting myself to Your Excellency, that you do me the good of giving me, in the name of his Majesty, by grant so that I will receive the benefit, that I will cause no damage to any pueblo in any way by its entrances and exits. I hope for all benefit and mercy and I swear in proper form that this my petition is not made in malice and to what is necessary, etc. Diego Gallegos.

In the Villa of Santa Fe on the 13th day of January of 1730 before me, the General Don Juan Domingo de Bustamante, Governor and Captain General of this kingdom of New Mexico and commander of its forces and presidios for His Majesty, he who is understood in this [document] presented it, and seen by His Excellency, he acted on it as presented and in accordance with what he [Gallegos] expressed in his writing. He made and makes him a grant of the said site in the name of His Majesty without prejudice to a third party who has a better right. And the Alcalde Mayor shall summon the Indians of Santo Domingo and of Cochití so that if they should have any right to ask for or represent they can do so before me, so that they may be heard in justice, and there being no impediment he will give to this party [Gallegos] royal and personal possession with the solemnity which is required and as the law provides. Thus, His Excellency decrees, orders and signs before me the present Secretary of Government and War. Don Juan Domingo de Bustamante. Before me Alphonso (Alfonso) Rael de Aguilar, Secretary of Government and War. In this Pueblo of Santo Domingo on the 31st day of January, 1730, before me the Captain Andrés Montoya in compliance with the above decree ordered by

the Señor Governor and Captain General, I caused to appear before me the principal sons of this pueblo of Santo Domingo who were the teniente, Cristobal Coris, the governor of the pueblo, the casiques and captains and many others to whom I made known the order, explaining it through the interpreter in their own language. They said that they did not have any right to present, that possession should be given him [Gallegos], that neither now nor at any time did they have anything to ask for or represent. And having intimated [the same thing] to the governor and teniente of the Pueblo of Cochití they said that they had nothing to place in contradiction. In this agreement, as alcalde mayor and war captain I went to the boundaries of this said pueblo with two witnesses of my assistance and gave him royal possession, carrying out the customary ceremonies, and he remains in peaceful possession.

[The following lines are torn and missing from the original and are translated from the 1791 copy] and so that it may be evident I sign it in the Pueblo of Santo Domingo and so that it is evident I again state I the said alcalde signed it with those of my assistance for lack of a royal scribe for there is none present in this kingdom and it is dated in the said pueblo the said day, month and year to which I certify. Andrés Montoya, jues receptor. Attesting witnesses Cristoval Martin; Josef Miguel Garduño.

It agrees with its original from which I the said alcalde mayor of the Villa of Santa Fe, Don Antonio Holibarrí [Ulibarrí] had it copied to the letter, made certain, corrected and compared

[The remainder of the original is illegible]

and to see it made were as witnesses the squadron corporal Cristobal Martín and José Miguel Garduño, and so that it is evident I sign it in this said villa on the 10th day of the month of November, 1745 acting in capacity of receptor due to the well known lack of a royal and public scribe, with the witnesses of my assistance as above –

In testimony of which I make my customary signature.

Antonio de Holibarri (Ulibarrí)
Jues receptor

Witness
Antonio Felix Sanches Gregorio Garduño

[The following certification is placed at the end of the 1791 copy]

Whereas the Governor Santo Domingo and his teniente with the rest of the Indian principales of the said pueblo presented themselves before me in order that I should make for them the said instrument because its original was in pieces, therefore I the appointed alcalde mayor of the Keres nation, through the faculty conferred upon me, make the said instrument at the petition of the parties, faithfully copied, corrected and and compared in accordance as is its original and so that it may be evident wherever it is suitable I, the said alcalde sign it in the said pueblo on the 14th day of the month of December, 1791 to which I certify.

Antonio de Armenta (rubric)

* * *

OJO DE BORREGO GRANT,
Surveyor General of New Mexico,
Case No. 118,
State Records Center and Archives

Translation by Myra Ellen Jenkins

Señor Governor and Captain General: Nerio Antonio Montoya, resident of the Pueblo of Cochití appear before Your Excellency in all form of law, and I say señor: that whereas I am living on the rancho of my father-in-law, Joseph Miguel de la Peña which is located between the Pueblos of Santo Domingo and Cochití, and his holdings being so scant that I cannot maintain a herd of mares nor any large or small stock, and so as not to damage the said pueblos in their plantings I had thought it well to buy from Phelipe Sandobal, soldier of this presidio, a tract (sitio) for raising livestock which he held from the heirs of Diego Basques Borrego, who for many years lived at a spring of water which, for this reason, is commonly called the spring of Borrego (Ojo de Borrego). And the said deceased (Borrego) always said that he had bought it from the deceased Diego Gallegos to whom all of the said site was recognized by local opinion as belonging. And whereas the said Diego Gallegos made no instrument to the said Borrego by which it was clear that the sale which he made to him reflected bad faith in the seller (Gallegos), if such were the case that he had done so, or in the said Borrego who enjoyed it for so many years without right of possession, declaring it as his goods in a clause in his will. For this reason his heirs sold it to the said Sandobal who is, as previously stated, the one from whom I bought. Thus, neither the said Diego Gallegos could sell nor the said Borrego buy, for the said spring is proved to be royal domain by the grant which was then given to the said Diego Gallegos which is now in the

ownership of the community of the Pueblo of Santo Domingo, as Your Excellency will understand from the said grant to which I refer, which is the one the said Indians received in royal sale from the widow, heir of the Said Gallegos. For this cause and as I am now pasturing my mares and cows on the said sitio, for the said reasons and since it is clear that it is royal domain and that there has been no opposition to those who have lived on it up to the present time, and having registered it and invested that at the said spring I can maintain that which God has been pleased to give me and that it will not damage any person for it is between the sierra of Cochití and that of Jémez, far distant from the said pueblos as will be evident to Your Excellency by the Alcalde Mayor of the said pueblos, Don Bartolomé Fernándes, and all being as I have said: I ask and petition that Your Excellency will be pleased to give me in the name of His Majesty, God guard him, a grant to the said sitio containing the said spring and will concede to me as boundaries: on the east with the grant to the said Indians; on the west with a mesa which runs from north to south facing towards Jémez; on the north with a small spring of water which runs towards the north and on the south with the same grant of the said Indians, where if it is conceded to me I will place a strong and stable monument marker and if not [at those boundaries], at those which Your Excellency will determine at the time of granting. For this I will receive benefit and grant, I and my children, heirs and successors and I swear that this is not done in malice, etc.

Nerio Antonio Montoya

Villa of Santa Fe, March 4, 1768

The Alcalde Mayor of the Pueblos of the Keres nation, Don Bartolomé Fernándes will inform himself as to whether the lands which Nerio Antonio Montoya asks in grant are royal domain and if conceding them to him will result in damage to any of the three Pueblos of Santo Domingo, Cochití and Jémez or to any other individual, likewise as to the distance comprised within the boundaries which he cites with respect to their respective directions, so that in his view he can accordingly prove it.

Mendinueta

Señor Governor and Captain General

In response to that which Your Excellency asked of me in the preceding decree I state that the lands which Nerio Antonio Montoya asked for are royal domain and that to concede them cannot cause damage to the pueblos, nor to any individual, I marked for him as boundary on the east side where the lands border which the Indians of the Pueblo of Santo Domingo bought; on the west by a little mesa where the road from Jémez joins with that from Zia and then comes to Cochití; on the south the said road from Jémez and on the north the slope (falda) of the sierra of Vallecito, the distance comprising from north to south a little more than two leagues, and from east to west a little less than two leagues, in consideration of which Your Excellency will determine as you may be pleased to do, and for which I sign this day, March 7, 1768.

Bartolomé Fernándes

In this Villa of Santa Fe on the 7th day of March of 1768, in view of the preceding petition presented by the one

contained in it [Montoya] and the report which continues after my decree of the 4th of this same month and year, made to me by Bartolomé Fernándes, Alcalde Mayor and War Captain of the Pueblos of the Keres nation, as well as it being the will of the king, our lord, that his lands be settled and that his vassals increase their goods; I, Don Pedro Fermin de Mendinueta of the Order of Santiago, Colonel of the royal armies, Governor and Captain General of this Kingdom state: that I conceded and do concede, in the name of His Majesty (God guard him) to Nerio Antonio Montoya the grant of lands which he asks for to pasture his herds, for himself, his children and heirs, without prejudice to a third party who may have a better right, with the condition that he settle them within the period provided for by law and that he not sell them nor encumber them to any ecclesiastical person. And the boundaries of these lands granted by me in the said form to the said [Montoya] are the same ones and with the same distances understood in the said report and no more. And so that the said Nerio Antonio Montoya may take possession of them, I give sufficient commission and whatever is required by law to the said Alcalde Mayor Don Bartolomé Fernándes in order that with the citation of the adjacent residents he should proceed to give it [possession to Montoya], and there being no opposition from a legitimate party that he do so in the accustomed form, and likewise he will give a testimonio (legalized copy) of everything if the grantee should request it, in order that it serves as sufficient title, and he will return the originals so that they may be filed in the archive of this government. And thus I approve, order and sign with the undersigned witnesses of my assistance for lack

of scribes, for there are none of this rank within this government.

Pedro Fermin de Mendinueta
(rubric)
Matheo de Penarrendonda (rubric)
Antonio Moreto (rubric)

In this place of San Antonio on the 20th of March, 1768 I, Don Bartolomé Fernándes, Alcalde Mayor and War Captain of the Pueblos of the Keres nation, by virtue of the commission conferred upon me by the Señor Don Pedro Fermin de Mendinueta, of the Order of Santiago, Colonel of the royal forces, Governor and Captain General of this Kingdom of New Mexico, being in the said site with the summoning of the sons of the Pueblo of Santo Domingo who are the residents adjacent to the said lands by having purchased from Diego Gallegos, and having ordered them to place a monument marker on their boundaries, which was agreeable to them, in consideration of which and no injury having resulted, I marked out for Nerio Antonio Montoya the boundaries stated above by the Señor Governor under the land comprised in my report where I ordered him to place a strong and stable monument marker and informed him of the conditions expressed above. And everything being understood, I took him by the hand, placing him in possession of the said land, he pulled up grass, threw rocks to the four winds and we all said from one to three times "Long live the King, Our Lord, God guard him," in the sign of true possession, which I gave him and he took over quietly and peacefully without opposition, and so that it is evident, I, the said Alcalde Mayor, signed it with two witnesses of my assistance who acted with me for lack of

scribes, for there are none in this kingdom, on the said day, month and year, as I certify.

Bartolomé Fernándes (rubric)

witness: Antonio Miguel Thenorio de Alba
(rubric)

witness: Bartolomé Fernándes de la Pedrera
(rubric)

* * *

SPANISH ARCHIVES OF NEW MEXICO I,
No. 1232
State Records Center and Archives
Translation by Myra Ellen Jenkins

Señor Lieutenant Colonel and Governor of this Province, Don Alberto Maines (Maynez)

My very dear Señor and of my highest esteem, greetings. The Indians of the Pueblo of Santo Domingo, which mission is in my charge, have come today this date and asked that I write to Your Excellency and make known, for they do not know how to explain it, as follows: The league which they hold having been marked to the four winds for their subsistence, they already know where it is and how far its terminus and boundaries extend. What they are asking is that Your Excellency be informed concerning a piece of land which is more than a league from the river bank [Rio Grande] which extends as far as the old Pueblo of Cochití and which is a purchase which they made for which the Indians of Santo Domingo paid 400 pesos. The old Pueblo of Cochití is on a site at a distance from that bank where there is a medium sized hill which they call that of "los chicos." Hence, it is evident in this

document as Your Excellency can see, that this is the land which they request and they have reason to do so, for they bought it, and the document or affidavit which they will show Your Excellency makes clear those who bought it and those who sold. This is the situation: so that Your Excellency need not be overly concerned by them, I make this particular account in order that you may determine what which you find to be fair in justice. I am glad of this occasion to greet Your Excellency, and that you may command your most attentive servant and chaplain.

Who kisses your hand
Fr. Antonio Cavallero (rubric)

Mission of Cochití
August 14, 1808

My best wishes to Señor Manrique and his wife.

Address

Señor Don Alberto Maines, serving many years as Lieutenant Colonel of the royal forces, Acting Governor of this Province in Santa Fe

* * *

MANUEL SANCHEZ PAPERS
SANTA ROSE DE CUBERO GRANT
State Records Center and Archives

Translation by Myra Ellen Jenkins

My dear Señor, Governor Alberto Maines:

The Indian principales of Santo Domingo have come to see me with the conclusion that it is desired to deprive them of the Rancho de Cubero, for it is not known what document the vecino Santiago Fernándes produced for this site, and the Indians have purchased the rancho as is

evident from the document which they will show to Your Excellency, and for many years the said Fernándes has not come forward to object, for which I petition Your Excellency to render justice if it is merited.

I am glad of this occasion to greet Your Excellency and tell you that you should command your most firm friend, faithful servant and chaplain who kisses your hand.

Fr. Antonio Cavallero (rubric)

Santa Fe, September 2, 1815

The Rancho de Cubero belongs to the Pueblo of Santo Domingo according the the documents which it holds, and the Alcalde Don Jose Gutiérres will take care not to give anyone a reason for a just claim in granting the Fernándes what may be theirs.

In compliance with the superior decree of Your Excellency dated the 2nd of the present [month] in which you tell me that the Rancho de Cubero belongs to the Pueblo of Santo Domingo according to the documents which it holds, I state to Your Excellency that the document which they (the Indians) wish it to be does not speak of this Cubero land, but on the part of Santo Domingo and Cochití. As Your Excellency will see by the same citations in the document that it is a grant which was given to Diego Gallegos, whose grant gives the citations [boundaries] which the grant made to him *in the name of His Majesty for the said property* (sitio) *without prejudice to a third party who had a better right, and the alcalde mayor issued a summons to the Indians of Santo Domingo and Cochití.* Therefore, it is not on the side of Cubero. The said

document cites as boundaries, on the part of the north with the old Pueblo of Cochití which is in the sierra, on the south a spring of water which is in the cañada which runs down to the casita which they call that of Cubero, by which the spring will be the boundary, and not the casita, for the spring is at some distance to the west, and the casita is on the banks of the Rio del Norte, on the east by the road which runs down from Jémez to San Felipe, and on the west with the lands of Santo Domingo. The royal sale which María Josefa Gutiérres, widow of Diego Gallegos, made to the Indians of Santo Domingo also cites the same boundaries without variation. This land the petition also states is opposite (*en frente*) Santo Domingo, and Cubero is not opposite, but below the point of the league. The said grant makes it understood that the lands are for pasture and that its entrances and exits are between Santo Domingo and Cochití, and not between Santo Domingo and San Felipe.

The grant of Don Bartolomé Fernándes, now deceased, is quite conclusive in that it asks for the sobras of Santo Domingo and it makes for all the boundaries, as well as their being obvious to the sight, as they are, on the north by the lands of Santo Domingo, on the south by the lands of San Felipe, on the east the Rio del Norte and on the west by the Mesa of Las Casitas which they call those of Cubero, and the Apaches. No document is opposed to this grant; in virtue of which I proceeded to give the new grant to the heirs of the deceased Fernándes, all this done in the presence of the two republics of Santo Domingo and San Felipe, being in the Rancho de Cubero,

sobras of both pueblos, all the natives remaining in agreement and convinced, likewise the interpreters and governors as well as the rest of the principales and the communities of the said pueblos, the same ones agreeing that they have no right by any document which speaks in their favor.

The claim which the Indians of Santo Domingo now make, in accordance with what Juan Ignacio, the interpreter of the said pueblo tells me, is for the reason that the grant to the said Diego Gallegos cites as boundary the spring which is in the cañada de Cubero, and hence the said casita is opposite the spring, they wish that there be left in their favor [the land] as far as the boundary of the league, that they might have possession of it, alleging also the right to hold the cultivated land for farming from the said casita as far as their lands, which would be a little more than 300 varas and the said interpreter tells me that by giving them this piece of land which they ask for from the said casita as far as the league of San Felipe they will leave free to the Fernándes' [remainder of sentence illegible]

God guard Your Excellency many years
Bernalillo, September 4, 1815
Jose Gutiérres

Santa Fe, September 5, 1815

The Fernándes' being agreeable, there can be left to the Indians of Santo Domingo the planting lands near the casita which is cited.

Concerning the claim of the sons of San Felipe, it will be necessary to convince them with reason, and cede

them that which they hold so that they will not have to come here with complaints.

Maynez (rubric)

Señor Governor Don Alberto Maynez

In obedience to the Superior decree of Your Excellency dated the 5th of this present September which is a continuation of the request of the Indians of Santo Domingo and those of San Felipe, to effect which I went to the Rancho of Santa Rosa de Cubero, taking in my company two witnesses of my assistance, where I made the citation to the Indians of both pueblos. The Fernándes being present I made known to them the superior decree of Your Excellency in which it was stated to me that the Fernándes being agreeable, there could be left to the Indians of Santo Domingo the land which they are cultivating close to the casita which is cited. Concerning the claim of the sons of San Felipe I convinced them reasonably as to the doubt which they had as to the measurements of their league. After having read to them and explained the superior decree, all being present the Fernándes as well as the Indians of Santo Domingo and those of San Felipe, the Fernándes stated that it was agreeable to them to cede to the Indians of Santo Domingo as well as those of San Felipe the farming lands which both pueblos were cultivating and that also they gave the uncultivated land in a straight line, which land is common to both pueblos, in the same terrain, which is on the north side from the Rancho de Cubero bounding with the league of Santo Domingo, with which they have remained content, one and both pueblos, and I had them place firm boundaries [markers], on the south side a cross

carved with an ax in a cottonwood tree which is some 100 varas before arriving at the cited Casita de Cubero, on the east the Rio del Norte, and on the west the Mesa de las Casitas de Cubero and the Apaches. And so that it is valid I dispose it by judicial procedure which I sign in this place of Bernalillo on the 18th day of September, 1815, with the witnesses of my assistance, acting as *jues receptor* for lack of a public or royal scribe for there is none in this government, to which I certify.

Jose Gutiérrez (rubric)

Jues receptor

[Witness of] Assistance
Juan Miguel Gutiérrez (rubric)

[Witness of] Assistance
Jose Marcos Baca (rubric)

APPENDIX K

(October 11, 1985)
(Caption omitted in printing)

AFFIDAVIT OF
DR. FLORENCE HAWLEY ELLIS

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Dr. Florence Hawley Ellis, being first duly sworn, hereby deposes and states:

1. I am a professional anthropologist and Professor Emeritus of Anthropology at the University of New Mexico, having retired from teaching in 1971. I received my A.B. in 1927 and my M.A. in 1928 from the University of Arizona. I received my Ph.D. in Anthropology in 1934 from the University of Chicago. My first publication was in 1926, and since that time I have published over 200 monographs and articles, as detailed in my resume, which is attached hereto as Exhibit 21. During my teaching career, I have supervised more than 50 Ph.D. candidates, and I take pride in the fact that several of my former students are among the most prominent scholars of southwestern anthropology. I have also taught at the University of Chicago and the University of Arizona.

2. The discipline of anthropology is made up of several different fields of scientific inquiry, including archaeology, ethnology, social anthropology, physical anthropology, and cultural anthropology, as well as even more discrete fields like dendrochronology, and pottery sequences as a major key to specific Pueblo histories. My

own specialized research interests have been primarily in the areas of archaeology, ethnology, dendrochronology, and pottery, but I have also published in other subdisciplines. Since the late 1920s I have concentrated my research on the Pueblo Indians of New Mexico and their Anasazi ancestors. I have supervised excavations at Chaco Canyon, in the Gallina region, and in a number of districts of the Rio Grande area, and I have made studies of Pueblo pottery typologies and dating, which is a very important tool in studying abandoned Pueblo sites. A long-standing personal interest is the relationship between the great cultural centers of the Anasazi in the San Juan Basin and the modern Pueblo communities, and the spread of irrigated agriculture among the Pueblos. I have also done in-depth research on the social organization and land use of several pueblos.

3. I have been acquainted with Santo Domingo Pueblo since the late 1920s, but I began systematic studies of some aspects of Santo Domingo anthropology only within the last ten years. I have long been familiar with the vital arts and crafts traditions of Santo Domingo, particularly their economic emphasis on the manufacture and trading of turquoise jewelry. In 1978 I did a study of Santo Domingo's prehistoric and historic use of the Cerrillos area turquoise mines. Partly as a result of the extensive contacts established during that project, which entailed numerous interviews as well as archaeological and documentary research, I began to develop detailed information on the social organization and land use of Santo Domingo. In 1982 the Bureau of Indian Affairs authorized a research project to investigate the aboriginal

boundaries of Santo Domingo and the use by Santo Domingo of the lands within those boundaries. I was retained to undertake that project, for which I assembled a research team of Andrea Dodge and William Sundt. Andrea is my daughter, and has learned Pueblo ethnology as my assistant over a period of almost three decades. She is an expert interviewer and has done much of the field work, and necessary linguistic recording of native site designations for the Santo Domingo project. Mr. Sundt is a specialist in the field of petrography, which is the microscopic analysis of the constituent materials used in pottery. Because of the variability of such materials, petrographic analysis now enables us to be extremely precise in identifying pottery types and their provenience. Mr. Sundt has also assisted with the field work for the Santo Domingo project, especially the location and identification of the numerous small field house ruins in the northwest area of Santo Domingo's traditional land base.

4. The Bureau of Indian Affairs research project includes the entire aboriginal area for Santo Domingo, but at the request of the Pueblo, to date we have placed greater emphasis on the area west of the Rio Grande. Simultaneously with the Santo Domingo project, the Bureau of Indian Affairs also requested our assistance in developing data on the land and water use of the three Rio Jemez Pueblos, Santa Ana, Zia, and Jemez. I had previously studied these three Pueblos back in the 1950s and early 1960s, and welcomed the opportunity to renew and add to that work. Especially exciting was the opportunity to coordinate that research with the project for Santo Domingo, and to compare data on land-use traditions and boundaries among the four Pueblos. Not only

does the additional data provide an invaluable supplement, it also served as independent verification of much information received from the individual Pueblos. We were, for example, better able to canvass and locate the numerous ruins and other sites for each of the Pueblos, as well as to feel greater confidence in assigning particular sites to a single Pueblo or group of Pueblos, especially since some sites and/or shrines are shared by these Pueblos.

5. In 1983 I was asked by the attorneys for Santo Domingo to investigate Santo Domingo's use and occupancy of an area northwest of the village now called the Rael ranch. I had already conducted some research into that area and learned that the Pueblo ruin known officially as LA 85, which is on Potrero de Quemado about two mines northwest of Rael tract A, is strongly regarded by Santo Domingo not only as a most significant ancestral site but has extremely important significance for the Pueblo's current religious beliefs and practices. I suspected that Santo Domingo use of that general area was tightly intertwined with LA 85 and the Pueblo's religious complex, assumptions that were corroborated by subsequent researches. Some of my conclusions are set forth in the report entitled "Use of the Rael tract Area by the People of Santo Domingo Pueblo," attached hereto as Exhibit No. 22.

6. Analysis of pottery sherds from LA 85 shows that Anasazi people from the San Juan Basin, who made Mesa Verde style pottery, moved into LA 85 at approximately 1300 A.D. or shortly before. They constructed out of tufa a compact, semi-circle, three story pueblo the size of a football field. Situated on the southern end of Quemado

Mesa, LA 85 had a commanding view of a fertile upland bench spread out below it, which the people of LA 85 used to cultivate their crops. Along both sides of Corrales Canyon, which runs from the mesa southeasterly to Coriz Canyon, numerous ranchitos of from one to three room field houses were arrayed around a small spring located just off the northwest corner of Rael tract A. The inhabitants of LA 85 planted and occupied this area during the summers, and controlled the region from here west into the Bear Springs and La Jara Springs areas. After approximately 100-150 years they began to descend from their mesa fortress to the Rio Grande Valley, where they amalgamated with smaller villages to form what became the present Santo Domingo tribe. Pottery analysis shows, however, that even after the movement to the river valley, the field houses continued to be used, apparently for dry-farming frijoles (pinto beans). The area also assumed pronounced mythological significance, which it retains to this day. From the time of LA 85's first habitation up to recent times, Santo Domingo has steadily used the area surrounding the Rael tracts. Linked to Santo Domingo by a network of ancient pathways in the small canyons leading down to the village, this upland area has been a critical economic adjunct of the Pueblo for centuries. Besides farming frijoles in the open area below LA 85, the Indians of Santo Domingo harvested timber for their homes, their church, and for their bridge across the Rio Grande; they hunted deer, elk, and rabbits to supplement their diets; grazed their large community herds; and they gathered a wide variety of plants and herbs used for food, dyes, and medicines. Some gathering activities, as

well as some hunting activities, are carried on individually, which many non-Indians view as the proper and ordinary manner of undertaking such activities. The Pueblo Indians, however, and especially the Santo Domingos, commonly do such things in a communal manner. Rabbit hunts were traditionally major community projects, intensively conducted and frequently carried on for several days; piñon gathering (the piñon nut being considered an important staple) was continued for weeks in the high country. Much of the village used to set up camp in the Corrales Canyon area, near the spring, and spend weeks gathering piñon and other plants throughout that area. At night there would be social dances, and during the day some of the men would go into the mountains to hunt. During Spanish times, and up to this century, the "sacred" dances were apparently performed in this locale because of the seclusion it offered. It is apparent that the area below LA 85 was not merely a convenient place to go, as it is, but was also a place of deep spiritual significance. On many occasions I have heard people refer to the area as the "real" Santo Domingo, and I can attest as a professional anthropologist who has studied the Pueblos for over fifty years, that no place is spiritually more important to any people than is the area surrounding LA 85 to Santo Domingo. This is the area where they gather evergreens for their dances, where they conduct very sacred esoteric ceremonies, and where they make pilgrimages to leave prayer offerings. LA 85 is regarded as the spiritual home of Santo Domingo, and thus a religious significance infuses even the somewhat mundane activities of hunting and gathering.

Based upon the archaeological and ethnological data acquired from my study of Santo Domingo, as well as from Jemez, Zia, and Santa Ana, it is my opinion that Santo Domingo has continuously used, and intermittently occupied, the area below LA 85, including the Rael tracts, from at least 1300 A.D. and possibly before to the present, a possession disrupted only by the limited intrusion of the Rael family and a few other non-Indians during the middle part of this century. As I testified in July in this case, probably every adult male from Santo Domingo goes to this area at least once a year. I doubt that a more clear indication of continued use could be established in the absence of Santo Domingo completely relocating its village into the mountains.

7. Approximately a year ago, the attorneys for Santo Domingo requested that I undertake the additional task of investigating the boundaries of a Spanish land grant purchased by Santo Domingo in 1748, the Diego Gallegos grant. They felt that it might be useful to bring archeological and ethnological skills to bear on the problem of locating the grant boundaries accurately. The conclusions I reached are set forth in the report entitled "Historical and Ethnological Considerations Relative to the Boundaries of the Diego Gallegos Grant," attached to this affidavit as Exhibit No. 23. I was fortunate to have translations of several Spanish documents done by Dr. Myra Ellen Jenkins, which by themselves enabled Andrea and me to fairly accurately determine the location of the Diego Gallegos Grant. Indeed it is quite exceptional to have so many different documents to help one locate old land grant boundaries, which are often notorious for their vagueness. We began with the premise that the eastern

boundary was the Santo Domingo league boundary. The west boundary was also straightforward, being the east boundary of the Ojo de Borrego grant, as shown by the documents on that grant. The south boundary was clearly a spring in Borrego Canyon. After a good deal of delay, because the spring is a shrine, members of the Tribal Council took us to Santo Domingo Spring early this year. The abundant archaeological evidence in the vicinity of the spring and the documentary evidence on the Santa Rose de Cubero Grant all suggest quite strongly that this spring is the one referred to in the grant. From Santo Domingo Spring, LA 85 is almost due north. The only other Pueblo ruins in this vicinity are the small field house ruins to the southeast of LA 85, which are on the flat. An 1808 document indicates that the ruin intended as the boundary call was next to a medium sized hill, a description that fits LA 85, but not the smaller sites. In addition, LA 85 is properly described as being "in the sierra," but the small ruins are not. LA 85 is really the only likely candidate for the north boundary of the Gallegos Grant. It is a massive, citadel-like ruin perched directly at the head of the tract, an ideal landmark, set amongst the mountains that rise abruptly behind it. The only doubts I had at all that this was the north boundary were my conclusions that LA 85 was a primary ancestral site for Santo Domingo, and not Cochiti. As shown in my report, however, most ruins on the Parajito Plateau have long been properly associated with Cochiti (to a large extent because of Santo Domingo's conservative policy of secrecy), and this loose practice appears to have resulted in LA 85's being incorrectly regarded as an "old pueblo of Cochiti." Based upon the documentary evidence, several

days of fieldwork by my research team, an examination of the topography of the area, and ethnological data obtained from both Indians and non-Indians, it is my opinion that the boundaries of the Diego Gallegos grant are those described in my report.

/s/ Florence Hawley Ellis

Sworn and subscribed to before me this 10th day of October, 1985.

/s/ Notary Public

My commission expires:

3/19/88

APPENDIX L

(October 11, 1985)
Caption omitted in printing)

AFFIDAVIT OF DAVID SNOW

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

David H. Snow, being first duly sworn, hereby deposes and states;

1. that I am a professional anthropologist specializing in Southwestern archeology and ethnohistory with thirty years experience, primarily in the Rio Grande Pueblo area. I hold an MA degree from Brandeis University (Waltham, MA), and expect the PHD in Anthropology from the University of New Mexico in 1986. I currently operate and own Cross-Cultural Research Systems, a consulting business specializing in the cultural history and anthropology of the Southwestern United States. I was for fifteen years supervisor of Contract Archeology and Curator of Archeology with the Laboratory of Anthropology, Museum of New Mexico in Santa Fe. Although my professional archeological career includes considerable experience in Southwestern prehistory, my publications record (nineteen published articles, and 18 unpublished manuscripts) emphasizes a primary research interest in and focus on the history and archeology of the Spanish Colonial and Pueblo Indian world of the 16th, 17th and 18th centuries in New Mexico (please see attached resume).

2. that I am familiar with the issues surrounding the location of the boundaries of the Diego Gallegos Land Grant, as a result both of my previous historical research unrelated to the current case, and from having read thoroughly a report on the history of the Diego Gallegos Grant recently prepared by Dr. Myra Ellen

Jenkins. From my own reading of relevant documents in the Spanish Archives of New Mexico, and of Dr. Jenkin's [sic] history of the Grant, I am of the opinion: (a) that the boundaries of the Grant are clearly delineated by the Pueblo of Santo Domingo league on the east, by the east boundary of the Ojo del Borrego Grant on the west, by the "Old Pueblo of Cochiti" on the north, and on the south by a spring in the southern end of Borrego Canyon on the San Felipe north boundary, some three or four miles northwest of the ruins of the settlement of Santa Rosa de Cubero; and (b) that the Spanish Colonial government and its officials consistently recognized these boundary calls for the Diego Gallegos Grant given in the original document, which lands were later purchased by Santo Domingo Pueblo.

3. that I concur with the identification of a ruined prehistoric pueblo listed in the Museum of New Mexico Archeological Site Inventory files as "LA 85", as that of "Old Cochiti" referred to in the Diego Gallegos Grant north boundary call; that I have visited the site in question and have examined its topographical situation and location in terms of information and descriptions provided in documents relating to the north boundary call of the Diego Gallegos Grant;

4. that I have visited, in company with Santo Domingo tribal officials, Mr. Scott Borg, Mr. Richard Hughes, and Dr. Myra Ellen Jenkins, a spring located on the north boundary of San Felipe Grant, in the west side of Borrego Canyon, referred to by Santo Domingo Pueblo as A'tapa; and I am of the opinion that this spring is the only candidate for that referred in the Diego Gallegos Grant (and in subsequent land grant disputes) as the south boundary call of the Diego Gallegos Grant;

5. that a short distance east of the spring (some two-three hundred meters) I observed the ruins of a small habitation with one or more associated structures and

petroglyphs on isolated basalt boulders in the immediate vicinity; the archeological evidence, in the form of surface artifacts, especially native ceramics, abundant stone tools and debris, and Pueblo-style rock art, and the visible architectural remains, indicate use of the site over a period of time between the mid-eighteenth century and the first quarter of the nineteenth century; and that no later use of the site is evident; and that the absence of corrals or similar animal pens and cultivable fields in the area suggest: (a) use of the site by non-Indians, and (b) its use for purposes unrelated to permanent or seasonal subsistence pursuits, probably by Pueblo Indians;

6. that although I have not visited any of the features or the areas described for the west boundarycall of the Diego Gallegos Grant, I am of the opinion that the interpretation of that boundary call provided by Dr. Jenkins in her report referred to above, is the most accurate and reasonable one; furthermore, that without extensive archeological research along suggested alternative west boundary calls, determination of that line is best determined from interpretation of documents and use of aerial photographs, as indicated in the report referred to.

/s/ David H. Snow

Sworn and subscribed to before me this 11th day of October, 1985.

/s/ Notary Public

My commission expires:

2/4/88

APPENDIX M

(October 11, 1985)
(Caption omitted in printing)

AFFIDAVIT OF EARL ORTIZ

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

EARL ORTIZ, being first duly sworn, hereby deposes and states:

1. I am a professional surveyor employed by the federal government. I hold the position of Land Surveyor with the Southern Pueblos Agency of the Bureau of Indian Affairs, where I first started working in 1977. I received my B.S. in Civil Engineering and Technology from New Mexico State University in 1976.

2. I have had seven hours of surveying courses at New Mexico State University and since my employment with the Bureau of Indian Affairs, I have attended 226 hours of surveying workshops taught by professors and registered land surveyors. More specifically, I have had extensive experience and training in operating various types of surveying equipment: theodolites and electronic measuring devices, surveying calculations, New Mexico State Plane Coordinate System, Boundary Determination and Interpretation of Legal Descriptions, to name a few. I have also attended many legal land surveying seminars taught by people highly knowledgeable in their fields: attorneys, historians, and registered land surveyors.

Their seminars have dealt with the legal aspects of surveying, land laws, boundary control, research and investigation of original field notes and boundary determination. I have testified in court as an expert witness in several court cases as to jurisdiction and boundaries of Indian Reservations. I have worked on the research and investigation of the Santa Cruz Spring Tract which was accepted by an Act of Congress in 1983 for the Pueblo of Cochiti. Having been trained under the tutelage of an experienced land surveyor, and with my educational background, I have sufficient expertise to make field investigations, applying land laws, and doing research in legal and historical records to make judgment decisions as to boundary locations.

3. In late 1984 the attorneys for the Pueblo of Santo Domingo requested the assistance of the Branch of Real Property Management of the Southern Pueblos Agency (SPA) in investigating the boundaries of the Diego Gallegos land grant. As the head of the surveying section at SPA, I conducted the investigation and prepared a report detailing my conclusions. That report, entitled "A Report on the Diego Gallegos Grant Claimed by Santo Domingo," is attached to this affidavit as Exhibit 18.

4. In order to illustrate the boundaries and show the lands included within the grant, I also prepared two maps. The first map, attached as Exhibit 19, consists of four 7.5 minute U.S.G.S. topographical quad maps that have been pieced together. The titles of the four quads are Canada, Bear Springs Peak, Loma Creston, and Santo Domingo SW. On this composite map I drew four boundary lines, indicating the external boundaries of the Gallegos Grant. The north and south boundary calls were

located by field surveys, using a Wild T-2 theodolite and an electronic distance meter. The west boundary line was determined by adopting the east boundary line of the adjacent Ojo de Borrego Grant and extending it. The east boundary was determined by a paper measurement of a league from the old site of the mission at Santo Domingo. The lines shown are a reasonably accurate representation of the Gallegos Grant boundaries as described in my report, although greater precision would be possible if an actual field survey of all four boundaries were conducted. On this map I have also outlined the tracts which are the subject of the present lawsuit and have designated them as Tract A, Tract B and Tract C. These tracts are well within the Boundaries of the Diego Gallegos Grant.

5. The second map, attached as Exhibit 20, is a graphic depiction of the Gallegos Grant and the surrounding area. I prepared this map, working from the same U.S.G.S. maps that were used in the previous exhibit. This style of map accents major relief features such as mountains and canyons in order to show key topographical relationships. The labels assigned to the various features were in part taken from the U.S.G.S. quad maps and partly from information obtained from local informants.

6. In my investigation of the Gallegos Grant boundaries I used a variety of sources of documentary information: The primary sources were Dr. Myra Ellen Jenkins' report on the Gallegos Grant and her translations of the Gallegos Grant documents and other Spanish documents on adjoining grants. It is convenient that independent sets of documents not only verify Santo Domingo's claim of ownership of the Gallegos Grant, but also touch separately upon each of the four boundaries of the Grant,

making it a relatively simple matter to place the Grant in its correct position. My research also included the files of the Surveyor General and the Court of Private Land Claims. In those files I examined documents relative to Santo Domingo, and also documents on the following grants: 1) Santa Rosa de Cubero; 2) Ojo de Borrego; 3) Canada de Cochiti; 4) San Felipe; 5) Cochiti; 6) San Ysidro; 7) Ojo de San Jose; 8) Ignacio Sanchez Vergara; and 9) Antonio Armenta. I also examined plats and field notes of the surveys of the above grants. My research further utilized the reports of Dr. Florence Hawley Ellis on Santo Domingo's use of the Rael tract area and on the boundaries of the Gallegos Grant. I also reviewed an assortment of secondary materials such as Adolph Bandelier's "Final Report" and Leslie White's 1935 study of Santo Domingo. I referred, of course, to several different maps, including old U.S.G.S. maps dating back to 1890, as well as sheets from the Wheeler surveys done in the 1870s. Finally, I carefully examined aerial photographs of the Gallegos Grant area, both at the agency where I work and at the Technology Application Center at the University of New Mexico.

7. Apart from documentary researches, I conducted at least twenty field trips to investigate the Gallegos Grant's boundaries. Several of these excursions were in the company of Andrea Dodge, a member of Dr. Ellis's research team, and we usually took along one or more members of the Tribal Council from Santo Domingo. On at least two occasions, I was accompanied by a knowledgeable non-Indian from Pena Blanca named Miguel Montoya, who provided much information on place names in the area. I have visited all of the Gallegos Grant

boundaries several times. They are all very logical boundary calls and fit together exceedingly well. They fit the descriptions provided in the Spanish documents without any anomalies and make of the Gallegos Grant a coherent geographical entity. Having reviewed a large number of grant documents and surveys in my position with the federal government, I can state confidently that probably no Spanish grant survey has ever been as thoroughly researched and documented as have the boundaries of the Gallegos Grant. In my opinion there are no plausible alternatives to where I have located the Grant boundaries. In any event, it is certain that the Rael tracts are well within the boundaries of the Gallegos Grant. I cannot see how any defensible realignment of those boundaries could possibly exclude the Rael tracts from the Grant.

/s/ Earl Ortiz

Sworn and subscribed to before me this 10th day of October, 1985.

/s/ Notary Public

My commission expires:
7/4/88

APPENDIX N

(November 14, 1985)

Excerpts from
DEPOSITION OF JOHN O. BAXTER
(Taken October 24, 1985)

Q. Have you actually seen this stack of documents, which includes Dr. Jenkins' report?

A. Yes, I have.

Q. You can actually refer to that copy yourself now, and I will look at this one.

If you would turn to Exhibit 4, Mr. Baxter. I'm sorry, I think I mean 3. And, again, these exhibit numbers refer to the exhibits attached to Plaintiff's Motion for Summary Judgment in this case.

Do you have Exhibit 3 there?

A. Yes.

Q. Do you understand that Exhibit 3 to be a copy of the original 1748 deed from Maria Josefa Gutierrez to Santo Domingo, together with the original land grant documents?

A. Yes.

Q. Do you have any question as to the authenticity of those documents, that is, as they being actual documents generated in 1748, executed by the persons whose names appear thereon, and purporting to convey this grant to the Santo Domingo Pueblo?

A. No, I am quite sure that they are authentic.

Q. Fine. Attached to the 1748 deed in part of that Exhibit 3, is a copy of the original 1730 grant documents. Is that your understanding?

A. Yes.

Q. And that copy appears to have been made in 1745 and was certified by a local official?

A. Hulibarri?

Q. Yes.

A. Yes.

Q. Does that appear to be an authentic document?

A. I think so, yes.

* * *

Q. In your experience, is Dr. Jenkins a competent translator of Spanish documents?

A. Yes, I think she's an excellent translator.

* * *

Q. Are you satisfied then, that this documentation satisfactorily establishes that in 1748, Maria Josefa Gutierrez did, indeed, sell to the Santo Domingo Pueblo a parcel of land described in the deed as the land granted to her deceased husband, Diego Gallegos?

A. Yes.

Q. And is the certified copy of the original grant documents attached to the original deed, in your opinion as a historian, adequate proof that such a grant was, in fact, made in 1730 to Diego Gallegos?

A. Yes, I would think so. Certainly, the copy appears to be authentic.

Q. And is it properly certified by an official who had authority to make such a copy?

A. Yes.

Q. It's true, is it not, that many land grants in New Mexico have been confirmed upon far less documentation than appears underlying this grant? Isn't that true?

A. I think that would probably be true, yes.

* * *

Q. Do you recall offhand the boundaries given for the Gallegos grant in the grant document, or the deed?

A. As I recall, it's bounded on the east by the lands of the Pueblo, on the north by a ruin which is identified as the old Pueblo of Cochiti, and on the west by, something to the effect "where the trail from Jemez and Zia goes towards Cochiti."

Q. Is it Cochiti or San Felipe? You may be right. Perhaps you can refresh your recollection by looking at Dr. Jenkins' translation of Exhibit 3, first page, in the middle.

A. In Exhibit 3?

Q. Yes. Exhibit 3 is after the exhibit sheet.

A. (Witness refers to document.) Right. It says, "From Jemez to San Felipe."

* * *

Q. Are you familiar with the site of the old Spanish settlement of Cubero?

A. I have never been on the ground, but as a place name, you can find it in documents up into the 19th century.

Q. Is it a well-known site?

A. Yes, at least for quite a long time.

Q. And can you describe the approximate location of Cubero?

A. It's on the west bank of the Rio Grande. I'm not sure exactly at what point, but it would be south of Domingo quite a ways.

Q. And is it at the mouth of the canyon?

A. Yes, I believe it's at the mouth of Borrego Canyon.

Q. So it's reasonable to assume that that south boundary refers to a spring in Borrego Canyon?

A. Yes.

* * *

Q. Would you agree that this document, the 1815 proceedings, as well as the 1808 letter, suggests that Santo Domingo is being particularly vigilant in looking out for the integrity of its title to the Gallegos grant?

A. It certainly would seem so.

Q. And that would also be consistent with their having approached Antonio Armenta in 1791 to have him

re-copy the documents to be sure they had good copies; is that not so?

A. Yes.

Q. Would you agree that in the annals of New Mexico land titles in the Spanish period, that that shows perhaps an unusual degree of attentiveness to maintaining one's title records and the integrity of one's holdings?

A. Well, they certainly are evidently being vigilant as to any problems with encroachments.

Q. And is it safe to say that on every occasion, or on at least the two occasions, the making of the Borrego grant and the making of the Cubero grant, that the Spanish officials took care to insure that the Santo Domingo title to the Gallegos grant was not infringed upon?

A. Yes.

Q. Are you aware of any other documents after 1815 that contain any indication that Santo Domingo's title to the Gallegos grant was conveyed or other wise impaired or lost in any way?

A. No.

Q. Do you have any reason to believe that there are any such documents?

A. No.

Q. Is there any reason to doubt, based upon the record we have just discussed, that at least as late as 1815, Domingo's title to the Gallegos grant was recognized by the Spanish authorities in New Mexico?

A. Well, it certainly seems that the authorities did recognize the title, yes.

Q. Would you have an opinion as a historian, then, Mr. Baxter, again, based on the documentary record that's available, as to the status of Santo Domingo's title to the Gallegos grant as of 1848?

A. It would appear to be quite strong, at least, certainly up to 1815.

Q. And, again, there's nothing that you know of beyond 1815 that would impair it?

A. That's correct.

* * *

Q. I meant to ask you the same question, actually, with respect to Exhibit 2, which is Dr. Jenkins' report on the Gallegos grant itself and the documentation of it.

You said you did have a chance to read that once?

A. Yes.

Q. And that report generally describes the documents, primarily the documents we have just been discussing, as well as subsequent activity?

A. Yes, that is true.

Q. Again, in your review of that report, was there anything that you encountered that you disagreed with or felt was unjustified?

A. No. I think that the report is excellent. My only criticism would be that as it approaches the present time, that it sort of trails off.

* * *

Q. Along with your examination of the documentation of the grant, have you also reviewed Dr. Jenkins' discussion as well as the discussions by Mr. Ortiz and Dr. Ellis, of the locations of the boundaries of the Gallegos grant?

A. I have read the reports, yes.

Q. You read all three of those reports?

A. Yes.

* * *

Q. Fine. Just to look at those points seriatum, first of all, the reference with respect to the east boundary of the grant being the land of the Pueblo of the Pueblo of Santo Domingo, is it reasonable, in your view, or not reasonable, to assume that that would refer to the minimum league entitlement of the Pueblo?

A. No, I thought that it would be reasonable.

Q. Now, with respect to the west boundary, of course, the original grant documents, as you have previously testified, refer to a road from Jemez over to San Felipe. Subsequently, of course, then the Borrego grant was made, which, by its terms, would abut the Gallegos grant on the west; is that correct?

A. Yes.

Q. Would you regard it as reasonable or unreasonable to accept the present east boundary of the Borrego grant as the west boundary of the Gallegos grant?

A. I think the terms, on the face of it, it's reasonable enough. My only question would be as to the actual placing of the line by the surveyors hired by the Surveyor General.

* * *

Q. Now, the boundary on the south, you have already testified, is described in the documents as a spring, which you feel probably is located in Borrego Canyon; is that correct?

A. Yes.

Q. And it's your understanding that Dr. Jenkins and Dr. Ellis and Mr. Ortiz all agree that the most likely spring is one called A-ta'-pa, or Santo Domingo spring?

A. Yes.

Q. Understanding that you have not been to that spring, I take it; is that correct?

A. That's correct.

Q. Have you, in fact, been in Borrego Canyon at all, or in this vicinity?

A. No, I have not.

Q. Accepting that, but based upon the discussion in the reports and the documents, do you find that conclusion, that that's the proper boundary call for the south boundary, to be reasonable or unreasonable, in your view?

A. Well, from my knowledge, it's certainly reasonable.

Q. If, in fact, there were no other spring in Borrego Canyon between Cubero and the Ojo de Borrego, that is, Borrego Spring, would it seem likely that that is the proper boundary point?

A. Yes.

* * *

Q. Would you agree that if, say the east and west boundaries of the Gallegos grant, as they're indicated on this exhibit – and I will represent to you that those lines are intended approximately to represent the lines described in these exhibits – if they're in the correct place, it's pretty unlikely that Borrego spring would be the intended south boundary call of the of the [sic] Gallegos grant, isn't it?

A. Yes.

Q. And, in fact, the Borrego grant documents referred to Borrego spring as being, or the area around the spring, as being Royal domain at the time of that grant, do they not?

A. (Indicating affirmatively.)

Q. You have to answer verbally.

A. Yes.

* * *

Q. Do you have any opinion as to whether the intended north boundary call is some other point other than LA 85?

A. No.

Q. Do you have any reason to to believe that it should be at some other location?

A. No.

Q. Would you view that subject identifying a particular Pueblo ruin as being consistent with these documents, as being within the realm of history, or archeology, or anthropology, or some other discipline?

A. I would say it's primarily an archaeological problem.

Q. So an archaeologist's opinion on that subject would be better informed, perhaps?

A. Yes.

Q. And you would defer to that opinion?

A. Yes.

* * *

Q. Just to go over a couple more points, Mr. Baxter:[sic]

The 1815 proceedings, involving the Cubero grant that we discussed previously, specifically deal with, in part of these, the identification of where the south boundary of the Gallegos grant lies.

Would you agree with that?

A. Yes.

Q. And would you agree that the investigation and characterization of the Gallegos grant is consistent with the conclusions arrived at by Dr. Jenkins, Dr. Ellis and Mr. Ortiz, as to where that grant should be placed?

A. Yes.

Q. The proceedings with respect to the Borrego grant in 1768, again, provide a basis for placing the west boundary line of the Gallegos grant, do they not?

A. Yes.

Q. And, again, that tends to be an independent corroboration of that boundary line, as well as of Santo Domingo's title to the Gallegos grant?

A. Yes.

Q. The 1808 letter from Father Cavallero to Governor Maynez, would you agree that that letter specifically refers to the ruin that is the north boundary called the Gallegos grant?

A. It seems to.

Q. And, again, it provides additional information that would help one identify the precise ruin intended as that boundary call, does it not?

A. Yes.

Q. And would you agree, based on, again, keeping in mind that you have not had a chance to go out on the ground and look at the site yourself, based on what you have seen in these documents and reports, would you agree that that letter supports the conclusion that LA 85 is the intended north boundary call?

A. Well, it's not unreasonable.

Q. Is it at all inconsistent, in your view, from what you know?

A. No, I don't think there's any inconsistency there.

Q. Are you aware of any other possible site that would be more reasonable to conclude is the intended north boundary call, based on what you have seen?

A. No.

Q. Just to recap, so I am sure that I have it right – and I apologize for being repetitive – do I understand you to be of the view, based on what you have investigated so far, that as of 1848, or, say, let's take the latest time we actually have documentation of, as of at least 1815, there was no question but that Santo Domingo was recognized as having valid title to the Gallegos grant?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. And you know of nothing between 1815 and 1848 that would have diminished the quality of that title in any way?

A. No. I know of no events of that kind.

Q. Do I understand you correctly, then, to be of the view that if anything affected Santo Domingo's title to the Gallegos grant, it would have been some event occurring in the American period?

A. Yes.

* * *

Q. Now, it is stipulated in this proceeding that in the 1930's and 1940's, the United States did issue

homestead patents to predecessors in interest to the Defendants in this case.

Do you understand that?

A. Yes.

Q. And is it clear to you that the boundaries of the Gallegos grant, as they have been described in the reports that we have already been talking about, would include the lands patented to the Defendants' predecessors?

A. Yes.

Q. You said you did have a chance to read Dr. Ellis' report, the one identified as Exhibit 22, concerning the use of the Rael – well, it's entitled, "Use of the Rael Tract Area by the People of Santo Domingo Pueblo."

A. Yes.

Q. Was there anything in that report that you disagreed with or had any different opinion on?

A. No.

Q. Is the subject of that report one within your area of expertise?

A. No.

Q. It's primarily an anthropological and ethnological study, is it not?

A. It would seem that way to me.

Q. As well as some archeological material concerning LA 85?

A. Yes.

Q. With respect to that material, would you defer to Dr. Ellis' opinion, or that of another archeologist or another anthropologist?

A. Yes.

* * *

Q. Let me ask you, do you have any opinion at this point as to whether the original 1730 Gallegos grant would or would not be viewed as a valid Spanish grant?

A. My opinion now is that it would be.

Q. And isn't it true that the subsequent recognition of Santo Domingo's title to that grant, at least up through 1815, would tend to confirm that it was recognized as a valid original title?

A. Yes.

Q. In fact, isn't it true generally, Mr. Baxter, that the consistent recognition of a title by the Spanish authorities over a long period of time would be of greater importance in determining the validity of that title than particular procedural details with respect to the original making of the grant?

A. Probably so.

Q. And in this case, you would agree, we do have a rather lengthy and consistent record of recognition of Santo Domingo's title to this property, do we not?

A. Yes.

Q. Are there any other points that you feel need to be investigated further with respect to any of the matters that we are discussing here?

A. I don't think so.

APPENDIX O

(August 7, 1986)

Excerpts from
TRIAL TESTIMONY OF JOHN O. BAXTER

Q. And you had been reviewing over the last two years the work of Dr. Jenkins and her report.

A. Well, yes, but not for that long. I think I first saw a copy of her report last fall.

Q. Okay. Now you're not an archaeologist or an anthropologist, are you?

A. No, I'm not.

Q. And are you an expert in surveying techniques?

A. No, I'm not.

Q. Okay. Now, you went over Dr. Jenkins' translations of the – I think she translated the Gallegos Grant papers and the Ojo de Borrego Grant papers and some letters from Father Cavallero and a few other translations from Dr. Jenkins. Did you review those translations?

A. Yes, I did.

Q. And did you have any particular problem with any of them?

A. No. I thought they were excellent.

Q. Okay. Now, you understand what's at issue in this case, don't you, the boundaries of the Gallegos Grant?

A. Yes.

Q. And what, to your understanding, is the eastern boundary of the Gallegos Grant?

A. Well, the eastern boundary of the Gallegos Grant is the western boundary of the Pueblo Grant.

Q. Okay. Now did it – the eastern boundary, did it specifically mention the grant to the Pueblo of Santo Domingo?

A. No, I don't believe so. I think it says the lands of the Pueblo.

Q. Now, the lands of the Pueblo, did that – does that have any kind of historical importance to you? Does it mean anything particularly – something specific?

A. Well, certainly, it referred to the lands that they were recognized as using.

* * *

Q. Okay. Now, you've heard testimony concerning the Cruzarte [sic] Grant papers in this courtroom, haven't you?

A. Yes.

Q. And they've been referred to as having very questionable authenticity. Do you agree with that, or –

A. Yes. There are lots of questions to be raised about the Cruzate Grants.

Q. And what was the date of the Cruzarte [sic] Grants, the purported date of them?

A. 1689.

* * *

Q. Okay. Now, from 1700 up until 1854, was there any Cruzarte [sic] Grant papers in the Spanish Archives?

A. As far as I know, no. I don't know of any record of them being there.

Q. Now, you reviewed the translation of the Gallegos Grant papers and felt that those translations were fine that Myra had done.

A. Yes.

* * *

Q. Okay. Now, Dr. Jenkins said that she had some question about the deed because Vega y Coca, at the time, was Alcalde Mayor at Taos; is that true?

A. There is one reference to his holding that position at about that time, yes.

Q. Is there any other references to Vega y Coca in any of the other documents?

A. Yeah. He also was Alcalde Mayor in Santa Fe for a while, somewhat earlier, around 1725, and sold some real estate in that area in 1727.

Q. Would this have been the area near the place we're talking about?

A. No. In Santa Fe.

Q. Oh. In Santa Fe. Did he own any other lands?

A. Well, at some point, he acquired land in the Cienega region.

Q. Now, Cienega is near, relatively near Cochiti and Santo Domingo.

A. Well, it's in between the Labajara Hill and Santa Fe.

* * *

Q. So you have no problems with regards to this Vega y Coca deed, in your mind.

A. I, I think that it's authentic but there is no additional reference to that sale in any documents that I know of.

Q. So there was no indication of continued ownership after the date of the deed?

A. No.

Q. Now, the deed itself, it didn't specifically list the boundaries of the Gallegos Grant, did it?

A. No, it didn't.

* * *

Q. And the Vega y Coca deed lists the sale as being a half-interest in a land grant that Gallegos owned between Santo Domingo and Jemez.

A. Yes.

Q. And that generally comports with where the Pueblo of Santo Domingo is alleging that the Gallegos Grant exists.

A. In a rough way, yes.

* * *

Q. Now I understand that the eastern boundary of the Gallegos Grant is the lands of the Pueblo of Santo Domingo.

A. Yes.

Q. And do you have an opinion about where the eastern boundary of that grant should be placed?

A. Well, it's very hard to say. The league was customary but, yet, the west boundary of the Pueblo Grant was set many miles east of that on the basis of the Cruzate Grant by the Office of the Surveyor General.

Q. So you believe that the eastern boundary should now be where the Cruzarte [sic] western boundary grant presently is at?

A. It's hard to say, but it's, I would say, a tenable position.

Q. That's acknowledging that the Cruzarte [sic] Grant papers have questionable authenticity.

A. Yes.

* * *

Q. And in fact, you agree, don't you, that there is absolutely no mention anywhere in any of the extensive documentation of Spanish Archives concerning Pueblo lands that refers to anything that even appears to be what we now know as the Cruzate Grants; isn't that true?

A. That's true.

Q. And you would also agree that that is so, notwithstanding the fact that there is abundant documentation concerning Pueblo lands in the Spanish Archives of New Mexico, is there not?

A. Yes.

* * *

Q. Do you, yourself, have an opinion as an historian as to whether or not the 1689 Cruzate Grants were, in fact, in existence at any time during the 18th Century in New Mexico?

A. It seems unlikely.

Q. Now, Mr. Baxter, let's put those aside for a moment. What was then, based on the documentation we have in the Spanish Archives of New Mexico, concerning Pueblo lands, what was the recognized entitlement of all the Pueblos, any Pueblo, to lands under the Spanish administration?

A. Well, the Pueblos were entitled to those lands that they were using with a minimum of a square league.

Q. And by "square league," do you mean a league measure in each direction from the church door and so forth?

A. Yes, or some –

Q. More or less.

A. – such landmark.

Q. And isn't it true that over and over, in the Spanish records of the 17th, or 18th Century, rather, and in fact well into the Mexican Period, we find that league standard being repeatedly applied to the Pueblos?

A. Yes.

Q. And uniformly so, is that not correct?

A. Well, frequently.

Q. Okay. And isn't it also true that in the documentation of the Spanish Archives of New Mexico, the term "tierras" or lands of the Pueblo is used virtually interchangeably with the league of the Pueblo?

A. Well, I'm not sure about that.

Q. Would you agree that it is done so in many cases?

A. I think that the terms speak for themselves.

Q. For example, did you examine the Santa Rosa de Cubero documents that are an exhibit in this case?

A. Yes.

Q. And do you recall references there to the grant being made to the lands that were between the lands of Santo Domingo and San Felipe?

A. Yes.

Q. And in the terms of that document, that referred to the league of those two Pueblos, did it not?

A. Yes.

Q. Are you aware of any other documentation of a different entitlement to land held by the Pueblo of Santo Domingo at any time during the 18th Century in New Mexico, apart from the Gallegos Grant itself?

A. No. I can't.

Q. You are aware, are you not, that repeatedly the league standard was applied to Santo Domingo in ascertaining whether or not there were encroachments on its lands by others?

A. Yes. Certainly to the north and south.

Q. And isn't it correct that the league – if a league was applied to the north or the south, normally, it also was the stand – accepted standard on the east and west as well?

A. Well, that would probably be true, unless they could demonstrate that they were using land beyond that boundary.

Q. But if we look at the Gallegos Grant language, a 1730 Spanish Grant, isn't it reasonable to assume that the reference to the lands of Santo Domingo, the *tierras* of Santo Domingo probably means the league of Santo Domingo on the west?

A. Well, it's not unreasonable, but it doesn't necessarily, automatically follow.

Q. Do you have any opinion that something different than that was probably meant?

A. I have no evidence to present to defend that.

Q. You're aware that Dr. Jenkins' opinion is that that probably and most certainly did mean the league of Santo Domingo on the west; are you not.

A. Yes. She so indicated in her report.

Q. Do you take issue with her on that, on that particular point then?

A. Not particularly, no.

Q. Looking at this often-discussed-but-so-far-here-unseen deed to one Miguel Vega y Coca by Gallegos in

1730, there really is nothing in that deed, is there, by which one can identify it as referring to any of the same lands that are involved in the Gallegos Grant, is there?

A. No, there's certainly nothing specific there.

Q. None of the boundary calls of the Gallegos Grant are mentioned, are they?

A. There are no boundary calls at all.

Q. And the only designation of the land is that it's San Miguel de la Cruz.

A. Yes.

Q. And we don't know where that is, do we?

A. Not as far as I know.

Q. Okay. Now, you've stated that the only land grant we know of that Gallegos ever possessed was the one that's in evidence here, the grant made in 1730 that was purchased by Santo Domingo; is that correct, as far as you know?

A. Yes.

Q. It is possible, is it not, that some other lands had been granted to Gallegos prior to that time?

A. Oh, yes.

Q. In fact, did you review the Borrego Grant documents in examining and preparing for this case?

A. I've looked at them.

Q. And do you recall, in the Borrego Grant documents, a mention that Diego Gallegos had apparently

claimed to own the land around Borrego Spring at one time and had purported to sell them to one of the predecessors in interest, to Nerio Antonio Montoya?

A. Yes.

Q. So it's conceivable that Gallegos may well in fact have had a grant further to the west of the grant we're concerned with here; isn't that possible?

A. It's not inconceivable.

Q. Or he may just have been selling land he didn't own.

A. That's possible, also.

Q. Okay. But the fact is that there's nothing further in the Spanish Archives that gives any indication whatever that Vega y Coca claimed any interest in any lands in that vicinity; is there?

A. No.

Q. And is it not true that in 1748, the Spanish officials approved a sale by the widow of Gallegos of the entire 1730 Grant to the Pueblo of Santo Domingo?

A. Yes. There's nothing to indicate otherwise.

Q. And in fact, the very same boundaries described in the original 1730 Grant are those set out in the 1748 Deed, are they not?

A. Yes.

Q. And it's also true, is it not, that thereafter, those boundaries were respected, investigated and respected by the Spanish authorities on several occasions; isn't that correct?

A. Yes.

Q. And so do you have any doubt that at least as late as 1815, Santo Domingo's title to the entire Gallegos Grant as described in the original 1730 Grant and the deed were respected or was respected by the Spanish authorities?

A. It seems that they had done an excellent job of defending it.

Q. And the Spanish had respected that title.

A. Yes.

Q. And there's certainly nothing in the historical record after 1815, is there, that indicates that Santo Domingo's title to this area was impaired in any respect, is there?

A. No, not I know of.

* * *

Q. Okay. Now, with respect to the other boundaries of the Cruzate Grant, we've talked about the league on the east; you recall the south boundary call, the Ojo de Agua and the Canada that comes down to the Casita known as that of Cubero, the spring of water?

A. Oh, excuse me. I thought you were talking about the Cruzate Grant.

Q. No. I'm, sorry. The Gallegos Grant. I may have misspoke. Excuse me.

A. Would you repeat the question then?

Q. Okay. Pardon me. I'm not trying to confuse you. In the Diego Gallegos Grant of 1730, do you recall that the south boundary is a spring of water and a canyon that comes down to the little house known as that of Cubero?

A. Yes.

Q. Are you familiar with the location of the settlement, the historic settlement of Cubero?

A. Yes, to a certain extent. It is a well-known place name on into the 19th Century. I know it's on the west bank of the Rio Grande, but I don't know the exact location.

Q. You're aware it's between Santo Domingo and San Felipe.

A. Yes.

Q. And are you aware that it's at the mouth of Borrego Canyon?

A. I've read that, yes.

Q. Okay. So would it be reasonable to expect that the spring referred to in the grant document is a spring in Borrego Canyon?

A. Yes, I think so.

Q. Have you made any investigation as to the location of springs in Borrego Canyon?

A. No.

Q. Are you familiar with the evidence that's been introduced into this case concerning A-ta'-pa Spring?

A. To a certain extent, yes.

Q. Okay. And you've read Dr. Jenkins' report and her comments on that spring?

A. Yes.

Q. Did you also see the report by Dr. Ellis and her daughter concerning their impressions of A-ta'-pa Spring?

A. Yes.

Q. And did you read the report by Mr. Ortiz on the boundaries of the Gallegos Grant?

A. Yes.

Q. Okay. And those are all exhibits in this case. Based on the information contained in those reports, do you find it reasonable to believe that that spring is probably the south boundary call of the Gallegos Grant?

A. Well, I have no reason to dispute their findings, but on the other hand, they're working from information that I don't have. They've been there and made inspection or, rather, inspections on the spot and I haven't.

Q. Okay. You personally know Dr. Jenkins and Dr. Ellis, do you not?

A. I know Dr. Jenkins very well. I've met Dr. Ellis.

Q. Okay. And you know Dr. Ellis by reputation.

A. Yes.

Q. You don't have any reason to doubt the integrity of their work or them as persons.

A. No.

Q. Okay. In fact, you agree that both of them are highly regarded in their fields.

A. Yes.

Q. Okay. And you don't have any different opinion as to where the south boundary of the Gallegos Grant ought to be situated on the ground, do you?

A. No.

Q. You stated you've reviewed the Borrego Grant documents, Mr. Baxter.

A. I've looked at them, yes.

Q. Okay. And you agree those are perfectly valid, authentic documents.

A. Yes.

Q. And do you agree also that in the proceedings leading up to the confirmation of the Borrego Grant, the Spanish officials had occasion to investigate Santo Domingo's title to the Gallegos Grant?

A. Yes.

Q. And is it clear to you that in the making of the Borrego Grant, the east boundary of that grant was expressly made the lands that Santo Domingo had purchased from Gallegos' widow?

A. Yes.

Q. Okay. So based on that, you would have no problem with the proposition that the west boundary of

the Gallegos Grant should be essentially a common line with the east boundary of the Borrego Grant; is that – (interruption)

A. Well, that's what the papers seem to indicate.

Q. Do you have any basis for a different conclusion, yourself, as an historian?

A. No.

* * *

Q. Now, you've testified a little bit as to your knowledge or lack thereof as to the site known as LA 85. Have you even been to LA 85, Mr. Baxter?

A. No.

Q. Okay. You agree, do you not, that the north boundary call of the Gallegos Grant is the old Pueblo of Cochiti which is in the sierra?

A. Yes.

Q. Do you have any different opinion as to a, than – Well, let me rephrase that. Is there any other site that you believe is a better candidate as the north boundary call for the Gallegos Grant than LA 85?

A. No. But, again, I have no knowledge of Pueblo ruins in that area.

Q. Is that a subject that an archaeologist would be better suited to give an opinion on, do you think?

A. I think so.

Q. And would you normally defer to the opinion of a qualified archaeologist on that point?

A. Oh, I would have to.

Q. Okay. Mr. Baxter, just a final point. I think I'm correct or I've been sort of assuming throughout this, but I am correct, am I not, that you have no doubt, do you, as to the authenticity of the Gallegos Grant documents and the deed from Gallegos' widow to Santo Domingo?

A. No.

Q. And you agree it's very clear that those documents were repeatedly, or, again, as we've stated before, that Santo Domingo's title to that grant was plainly recognized by the Spanish?

A. Yes.

APPENDIX P

(August 6, 1986)

Excerpts from
TRIAL TESTIMONY OF STEWART PECKHAM

Q. And you haven't even been to LA 85, have you?

A. No. I've driven along the road past it, but – And, actually, I was looking for it, but the road was pretty much impassable and so I didn't go much farther than the edge of the road.

Q. We, I or my clients, have not asked you to come up with an expert opinion about LA 85, have we?

A. No.

Q. Okay. And we haven't come to you for an expert opinion on the boundaries of the Gallegos Land Grant, have we?

A. No, you have not.

* * *

Q. Mr. Peckham, just to make sure I got it straight. Your testimony is that you have no expert opinion with respect to the present whereabouts of the descendants of the original occupants of LA 85?

A. No, I don't.

Q. Okay. You haven't really studied that site at all, have you, Mr. Peckham?

A. No. Aside from looking at the pottery and I have looked at the pottery at least from my level of expertise.

Q. But you really haven't examined it carefully or systematically, have you?

A. I have looked at it carefully and systematically, yes.

Q. Are you an expert in petrography or in any –

A. No, I'm not. Hum-um.

Q. – or in any other microscopic or chemical analytical technique?

A. Well, within the level of recognizing different tempers of the pottery, whether or not I can identify the actual materials that the tempers are.

Q. But that's a – Your technique is really just visual, isn't it?

A. Yes. Yes, that's right.

Q. Okay. So you haven't applied any microscopic or chemical or other technical –

A. No. I've not.

Q. – methods of examination to these potsherds?

A. That's right.

Q. Is this the only collection of potsherds you examined from LA 85?

A. There are two small bagsfull that essentially duplicate that material. Now, there could very well have been sherds within those bags that someone else has distinguished as being diagnostically different or something like that.

Q. But, again, you haven't been to the site, yourself, have you?

A. No, I've not.

Q. Okay. And have you studied any potsherds that are definitely associated with Santo Domingo Pueblo?

A. Certainly contemporary pottery, yes.

Q. I mean old. Prehistoric.

A. Well, present-day Santo Domingo is no longer where old Santo Domingo was, and what's left of pottery from earlier Santo Domingo villages, I have just looked at superficially.

Q. Okay. You haven't really studied it.

A. No.

Q. Okay. You stated you are familiar with Dr. Ellis.

A. Oh, very much.

Q. And are you familiar with the nature of her work over the years, the last 30 years or so?

A. Yes, I am. Um-hum.

Q. And do you have any doubt about her credentials as an expert in these fields, –

A. No, I don't think so.

Q. – fields of anthropology?

A. We have – We share – We don't always agree but –

Q. Of course not. The nature of the business, isn't it? She certainly is a respected authority –

A. Very much so, yes.

Q. – in this area. Now, Dr. Ellis testified earlier that she had gathered quite a few additional collections or she and members of her team had gathered a number of other collections of potsherds that were not in the Laboratory of Anthropology collection; are you aware of that?

A. Yes, I am.

Q. Okay. Have you examined those collections?

A. Not really. No.

* * *

Q. Today. Yes. Mr. Peckham, have you reviewed any of the documents or reports concerning the Diego Gallegos Land Grant?

A. No, I have not.

Q. You haven't looked at Dr. Jenkins' report on the documentation?

A. No, I have not.

Q. Are you at all familiar with the boundary calls for that grant as given in the documents?

A. I know Dr. Jenkins did come up to the Laboratory of Anthropology and consult the archaeological survey files relative to the boundaries. But, beyond that, I had other things that I was responsible for and did not stay with her while she was delving into the files.

Q. You're generally familiar, are you not, with her conclusions or opinions as to where those boundaries are situated?

A. Not really, no. I have not – As I say, I have not read the reports, so I don't know where she has placed them.

Q. All right. Do you have any opinion one way or the other –

A. No, I don't.

Q. Okay. You're not here to say a word about that.

A. No. No.

* * *

APPENDIX Q

(Feburary 21, 1986)

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SANTO DOMINGO, Petitioner, v. UNITED STATES OF AMERICA, Defendant.	)	Docket No. 355 [Filed October 24, 1969]

STIPULATION AS TO STANDING TO SUE, LIABILITY, AND AREA

The parties in the above-entitled claim hereby stipulate and agree as follows:

1. The Pueblo of Santo Domingo is and has been since time immemorial a tribe of American Indians residing within the present territorial limits of the United States. It has been recognized by the Government of the United States as a Tribe represented by its Governor and Council. This action was instituted within the time allowed by the Indian Claims Commission Act by and under the direction of the Petitioner, acting through its Governor and Council.

2. At the time of the Treaty of Guadalupe Hidalgo, which was concluded on February 2, 1848, 9 Stat. 922, The Pueblo of Santo Domingo aboriginally and exclusively used and occupied the area delineated on the attached map, and the Defendant is liable for extinguishing the Petitioner's title to said area.

3. There should be entered an interlocutory order that the Petitioner, the Pueblo of Santo Domingo, has the right and capacity under the Indian Claims Commission Act to bring and maintain this claim for and on behalf of the Pueblo of Santo Domingo, that the Petitioner has established Indian title to an area comprising approximately 77,237.24 acres and delineated on a map prepared by the Bureau of Land Management in August 1967, and that the Defendant is liable for having extinguished the Petitioner's Indian title to said area.

4. The parties agree to execute and file with the Commission a joint motion for entry of the interlocutory order provided for in this stipulation, submitting a proposed form of order for the approval of the Commission.

/s/ Assistant Attorney General of the United States

/s/ Howard G. Campbell
Attorney for Defendant

/s/ Darwin P. Kingsley
Attorney of Record for Petitioner in Docket No. 355

APPENDIX R

(February 21, 1986)

IN THE UNITED STATES CLAIMS COURT

PUEBLO OF SANTO DOMINGO,	)	No. 355D
v.	)	ORDER SCHEDULING SUSPENSION
The United States	)	Filed: November 7, 1985

1. This Scheduling Order is based upon information furnished in a Status Conference re: Indian Title Lands (re: taking – and possible management – claims dated: November 6, 1985.

2. It is determined that a Suspension or Deferral of activity is in order, pending:

___ Administrative Action

_X_ Related Case Outcome

_X_ Completion of Settlement or Stipulation

3. Accordingly, proceedings are hereby suspended until June 1, 1986.

4. A Status Report shall be filed by the parties jointly by June 1, 1986.

The joint Status Report (or any motion seeking to vacate the suspension) shall provide a summary of the proceedings accomplished under this Order, a statement of the present status of the case, and appropriate information concerning further proceedings to be implemented and, where possible, proposed schedules therefor.

/s/ Judith Ann Yannello, Judge

(2)

89-1716

No. _____

In The

Supreme Court of the United States

October Term, 1989

PUEBLO OF SANTO DOMINGO,

Petitioner,

v.

ARNOLD J. RAEL, SOPHIA V. RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY C. RAEL, and JERRY C. RAEL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Chris Lucero, Jr.
Attorney for Respondents
P.O. Box 7429
Albuquerque, New Mexico 87104
(505) 843-6687

QUESTIONS PRESENTED FOR REVIEW

I. The United States Is An Indespensable Party To This Action.

II. The Pueblo Of Santo Domingo's Motion For Summary Judgment Was Properly Denied Because Issues Of Material Facts Exist.

III. The Lower Court Lacks Jurisdiction Over This Action.

A. Extinguishment Of The Pueblo of Santo Domingo's Have Occurred.

B. The Defense Of Abandoment Applies.

C. Collateral Estoppel And Judicial Estoppel Applies.

D. The Doctrine of Election Of Remedies Applies.

E. Various Acts Of Congress Have Divested This Court Of Jurisdiction To Hear This Action.

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STATEMENT OF THE CASE

The Respondents (hereinafter referred to as the "Raels") are the owners of three tracts of land (referred to as "Rael Tracts 1, 2, and 3"), encompassing approximately 1280 acres of land, located roughly between Los Alamos, Albuquerque and Santa Fe, New Mexico. The tracts had originally been acquired by the Raels, or their predecessors in title, from the United States Government under the Homestead Laws during the middle and late 1930's, with the United States reserving the rights of way to ditches and canals constructed by the authority of the United States, and reserving to the United States "all coal and other minerals in the lands." The Petitioner, the Pueblo of Santo Domingo, is an Indian pueblo whose lands are East of the three Rael tracts.

On December 21, 1983, the Pueblo filed its "Complaint to Quiet Title" against the Raels to quiet title to the Real tracts in the name of the Pueblo on the basis of two land claims: first, that said tracts were apart of the aboriginal lands of the Pueblo; and second, that the Pueblo had purchased the alleged "Diego Gallegos" Spanish land grant in 1748 for "400 pesos" from "Maria Josefa Gutierrez," which claim was alleged to include the Rael tracts. The complaint also sought damages for trespass in the "Third Claim," and for damages for unauthorized grazing of livestock under 25 U.S.C. section 179.

Raels denied the allegations of the complaint, and counter-claimed against the Pueblo for slander of title. The counterclaim was dismissed by the lower court on June 6, 1984, upon the motion of the Pueblo, on the basis of the Pueblo's "sovereign immunity."

Upon the motion of the Pueblo, the lower court struck the affirmative defenses of laches, estoppel, limitations of action and adverse possession listed in the Rael's "Answer," and granted the Pueblo judgment on the pleading concerning the Rael's affirmative defense I, alleging lack of subject matter jurisdiction; defense IV, that the complaint failed to state a cause of action for which relief can be granted; defense V, that indispensable parties to the suit existed (the Rael tracts contained less than 5% of the total land claimed by the Pueblo to be in the boundaries of the alleged Gallegos land grant; the remaining land is titled in the names of other private land owners, the State of New Mexico, the U.S. Forest Service, the Bureau of Land Management, the Pueblos of

San Felipe, Cochiti and Jemez, and the Pueblo of Santo Domingo, itself); defense VII, that the Gallego's grant claim was barred by the provisions of the act establishing the Court of Private Land Claims, 26 Stat. (1891); and defense IX, alleging that the Pueblo of Santo Domingo had "confirmed and acknowledged" the Raels titles for decades, and had even passed a formal Tribal Resolution to purchase two of the three tracts for $587,000, immediately prior to the filing of the suit. (Doc. No. 33, "Memorandum Opinion and Order," filed 8/20/84, Petitioner's App. 37-40).

On December 7, 1984, the lower court granted a Rael motion to include in their Answer the affirmative defenses of "Abandonment" and 'Extinguishment."

On December 28, 1984, the Pueblo moved to dismiss without prejudice their two claims for damages for trespass and unauthorized grazing, which was granted on February 12, 1985. (On December 28, 1984, the Pueblo moved to strike the jury demand made by the Raels, since the action was to quiet title for which a jury trial was not allowed. The Raels responded that they had continuous, uninterrupted possession of the Rael tracts from the 1930's, that their present possession of said tracts made the action one in ejectment, for which a jury trial was allowed. The lower court held an evidentiary hearing on the factual issue of possession on July 8, 1985. On July 10, 1985, the lower court found the Raels to be in titled possession of the Rael tracts, making the claim of the Pueblo to be one in ejectment, for which a jury trial was available. (Doc. No. 91, "Memorandum Opinion and Order" filed 7/10/85, Petitioner's App. 28-36).

On February 6, 1985, the Raels filed a motion to dismiss based on the defenses of abandonment, extinguishment, lack of jurisdiction based on the provisions of the Indian Claims Commissions Act, 60 Stat. 1049 (1946), codified at 25 U.S.C. section 70 *et seq* (1976); and that the United States was an indispensable party to the action. The motion to dismiss was denied by the lower court on July 10, 1985. (Doc. No. 91, "Memorandum Opinion and Order" filed 7/10/85, Petitioner App. 2536).

On October 18, 1985, the lower court granted the Raels' motion to include in their answer the affirmative defense of "Election of Remedies." On October 22, 1985, the lower court denied the Raels' second motion to dismiss on the grounds that the

action was for ejectment, while the complaint was for quiet title.

On September 27, 1985, the Raels filed a third motion to dismiss and/or for Summary Judgment, which was denied on May 16, 1986. (Doc. No. 137, "Memorandum Opinion and Order" filed 5/16/86, Petitioner App. 16-27).

On October 11, 1985, the Pueblo filed a motion for summary judgment on its claim based on the purchase of the alleged Gallegos land grant in 1748. On May 5, 1986, the lower court partially granted the Pueblo's motion for summary judgment, ruling that the Gallegos land grant was a legal Spanish land grant made in 1730; that the Pueblo did purchase the grant from the widow of Diego Gallegos in 1748, which purchase was recognized by the Spanish officials, and the Pueblo of Santo Domingo neither sold nor divested the grant prior to the Treaty of Guadalupe Hidalgo in 1848; that the Pueblo had not been divested of the grant by abandonment or extinguishment, and had not lost its claim by any other actions or inactions of the Pueblo; and that the Gallegos grant claim is superior to the homestead patents received by the Raels, or their predecessors in title, from the United States Government. The lower court ruled that the sole issue for a trial on the merits was the location of the boundaries of the Gallegos grant, and those factual issues concerning the Pueblo's aboriginal use claim. The lower court further ruled that the defense of extinguishment was not available to the Raels, and that the defense of abandonment could only apply to the aboriginal use claim, and not concerning the Gallegos grant claim. (Doc. No. 137, "Memorandum Opinion and Order' filed 5/16/86, Petitioner's App. 16-27).

The cause came on for trial on the merits before a jury on August 5, 1986. After the first day of trial, the lower court requested counsel for the Pueblo to move for a bifurcation of the two claims based on aboriginal use, and the Gallegos grant claim. Over objection by the Raels, the lower court ruled that the trial would only involve the Gallegos grant claim, and that the sole issue of fact for the jury was whether the Rael tracts were within the boundaries of the Gallegos land grant.

At the close of the evidence , the lower court instructed the jury that the Pueblo had made a prima facie case concerning the location of the boundaries of the Gallegos grant and that the Rael tracts were within those boundaries; then he instructed the jury that the burden

of proof concerning those boundaries had shifted to the Raels, who had to prove that the Rael tracts were not within the location of the boundaries of the Gallegos grant which the lower court had already ruled the Pueblo had proved by prima facie evidence. (Doc. No. 160, "Court's Instruction to Jury" filed 8/8/86, Petitioner App. 44-47). After the four day trial, the jury returned a verdict for the Pueblo of Santo Domingo. (Doc. No. 162, Verdict filed 8/8/86, Petitioner's App. 43).

I. THE UNITED STATES IS AN INDESPENSIBLE PARTY TO THIS ACTION.

The lower court denied the motion to dismiss the complaint for failure to join indispensable parties stating only that:

> "In the case at bar the United States is not an indispensable party. Plaintiff is not seeking to cancel or challenge the validity of the patents issued to the defendants by the United States government. Plaintiff is asserting that it has prior and therefore better title than defendants. Plaintiff's claim does not depend on invalidating an action of the federal government." (Doc. No. 91, Memorandum Opinion and Order" filed 7/10/85, Petitioner's App. 36)

Rule 19 of the Federal Rules of Civil Procedure states in part:

> "A person... shall be joined as a party to an action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and his so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede is ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest."

In *Oglala Sioux Tribe v. United States*, 650 F2d. 140 (8th Cir. 1981), cert. denied 455 U.S. 907 (1982), in a situation very similar to the instant case, the court ruled the United States was immune from suit, and was an indispensable party to the action, requiring the dismissal of the action against the remaining land owners.

The patents received by the Raels from the U.S. government under the Homestead Act in the 1930's specifically reserved to the

United States rights of way to ditches and canals constructed by the authority of the United States, and "all coal and other minerals in the lands." The United States clearly has a direct propriety interest in the Raels tracts. The Raels' predecessor in interest to these lands is the United States. There is a possible argument that the Raels have an action for damages against the United States if the issued patents are ultimately held to have no legal effect, since the Raels have lived on, and have worked, the lands and made improvements on them for over 50 years. The Pueblo from the date of the homestead patents to the filing of this litigation always recognized the Raels possession and ownership of the Rael tracts.

The title to Indian lands is in the United States as trustee, with the Pueblo have only a possessory interest. The United States would have an interest in this cause for that reason alone, and should have been made a party to the action. *United States v. Candelaria*, 271 U.S. 432 (1925); *United States v. Chavez*, 290 U.S. 357 (1933); *State of New Mexico v. Aadomodt*, 537 F.2d 1102 (10th Cir. 1976).

The patents received by the Raels should not be susceptible to attack unless the United States is a party defendant. As this "It is a fundamental principal of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court." *Tewa Tesuque v. Norton*, 360 F. Supp. 452 (D.N.M. 1973), aff'd 498 F.2d 240 (10th Cir. 1974); see also, *Emhart Corp. v. McLarty*, 226 Ga. 621, 176 S.E. 2d. 698 (1970).

A U.S. patent is protected from third party attack. *Kale v. United States*, 489 F.2d 449 (9th. Cir. 1973); see also *Hoffnagle v. Anderson*, 20 U.S. (7 Wheat.) 212 (1822). "As a matter of federal law, it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, at 647 (1887); *Van Wyk v. Knevals*, 106 U.S. 360, 369 (1882); *Raypath, Inc. v. City of Anchorage*, 544 F. 2d 1019, 1021 (9th Cir. 1976). The Raels should not have to bear the burden of defending actions that should have been brought against the United States. *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957).

The United States government presently owns most of the land within the alleged boundaries of the Gallegos Grant, maintained either by the Bureau of Land Management, or the U.S. Forest

Service; the State of New Mexico owns several school sections, and even the Pueblos of Cochiti, Jemez, San Felipe, and Santa Ana own tracts of land within the alleged boundaries of the 49,00 acres claimed to be the Gallegos Grant; there are also other private property owners of tracts. The Rael have held grazing leases on approximately 4000 acres of land immediately west of the Rael tracts since the dates of the original patents in 1938. None of these other property owners were included as defendants in the Pueblo's efforts to establish the Gallegos Grant and its boundaries, even though their interests shall be affected by the instant case. The Rael grazing leases were also not included in the Pueblo complaint to quiet title. The Pueblos of Cochiti and Jemez also claim to have had aboriginal possession of the land surrounding the Rael tract.

The United States was an indispensable party based on its actual ownership of the mineral rights to the Rael tracts. Since the effect of the lower court's ruling is that the United States government never owned the Gallegos Grant, the retained mineral rights would be lost. However, the United States also had other interests in the outcome of this litigation than those mentioned. The Pueblo of Santo Domingo filed a claim for damages against the United States in the Indian Claims Commission alleging that it was entitled to damages for the wrongful taking of their lands, and the Rael Tracts are contained within the boundaries of the land allegedly wrongfully taken by the United States. *See generally, Pueblo of San Ildefonso, et. al. v. United States*, 30 Ind. Cl. Com. 234 (1973). The Pueblo's claims for damages never mentions the Gallegos Grant, yet the commission was organized to handle any and all claims which the Pueblo might have. See 25 U.S.C. Section 70a. In that I.C.C. case, the United States and the Pueblo of Santo Domingo stipulated that there had been an extinguishment of the lands claimed for damages, which again included the Rael tracts. *Supra* at 259-271.

The commission entered an "Interlocutory Order" giving effect to the stipulation of extinguishment, and made a ruling on the valuation date to be used. The United States filed an interlocutory appeal of the valuation issue, but the Pueblo of Santo Domingo did not file an appeal of any of the Commission's factual findings or/and legal conclusions. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (1975). The Pueblo of Santo Domingo, years after

time limits for appeal had run filed motions and objections with the Court of Claims (which inherited the unfinished work of the Indian Claims Commission in 1978, see 25 U.S.C. Section 70r [1976]), that requested the Court to allow it to withdraw from the stipulation which the Pueblo and the United States made before the Commission, alleging unauthorized acts by its previous attorneys.

In a divided opinion, the Court held "that it is far too late in the day to make a motion of this nature." *Pueblo of Santo Domingo v. United States*, 227 Ct Cl. 256, 266, 647 F.2d 1087, 1088 (1981), cert denied, 456 U.S. 1006 (1981). As it now stands, there exists a final, non-appealable judgment that the Pueblo of Santo Domingo is to receive money damages for the loss of the Rael tracts and the surrounding lands due to extinguishment by the United States government of any and all claims to the area which the Pueblo may have had.

At the same time the instant case was before Judge Bratton, another case was pending before a different District Court for the District of New Mexico involving the Navajo Tribe, with factual and legal issues very similar to the instant cause. In a diametrically opposite result to Judge Bratton's ruling, the lower court held that the Navajo Tribe could not pursue an ejectment action against private property owners concerning loss of lands which were within the jurisdiction of the Indian Claims Commission, in absence of the United States as grantor of the patents through which those defendants derive title, since complete relief cannot be afforded the remaining parties. In *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455 (10 Cir. 1987), the Tenth Circuit affirmed the lower court's decision after reviewing the four factors listed in Rule 19(b), stating that:

> "(1) that the claims against the non-federal parties rested on documents of title or possession derived from the United States; (2) that the Tribe seeks to cancel all such instruments; (3) that this Court has affirmed the principle that all parties to an instrument must be present, else it may not be cancelled; (4) that more specifically, validity of a deed or patent issued by the Federal Government cannot be questioned in suit by a third party against the grantee, and (5) that the Eighth Circuit has found indispensability in analogous circumstances." *Supra.* at 1472.

The Court recognized in *Navajo Tribe* that any judgment without participation of the United States would clearly prejudice the interests of the United States, and that this prejudice of interests could not be avoided by protective provisions in the judgment or through the shaping of relief.

II. THE PUEBLO OF SANTO DOMINGO'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE ISSUES OF MATERIAL FACTS EXIST.

On May 5, 1986, the lower court partially granted the Pueblo's motion for summary judgment, ruling that the Gallegos Grant was a legal Spanish land grant made in 1730; that the Pueblo did purchase the grant from the widow of Diego Gallegos in 1748, which purchase was recognized by the Spanish officials; and the Pueblo neither sold nor divested the grant prior to the Treaty of Guadalupe Hidalgo; that the Pueblo had not been divested of the grant by abandonment or extinguishment, and had not lost its claim by any other actions or inactions of the Pueblo; and that the Gallegos Grant claim is superior to the homestead patents received by the Raels, or their predecessors in title. Concerning the Gallegos Grant claim, the lower court ruled that the sole issue of fact to be tried to a jury was the location of the boundaries of the Gallegos Grant. (Doc. No. 137, "Memorandum Opinion and Order" filed 5/16/86, Petitioner's App. 16-27).

In its response to the Pueblo's motion for summary judgment, the Raels listed what they considered to be questions of fact:

1. The original grant papers are lost and unavailable; the Pueblo relies on a purported copy of the grant, made by one Ulibarri on November 10, 1745 (the grant was made in 1730) The Pueblo's historical expert, Myra Ellen Jenkins, indicates that the Ulibarri copy "transposed the western boundary description with that on the eastern boundary." A second copy of the Ulibarri copy was made on December 14, 1791, by one Armenta, which made a correction of the Ulibarri "mistake" of the eastwest boundary description. (Doc. No. 104. Ex. 2, Jenkin's Report, Petitioner's App. 60)

2. Diego Gallegos sold a tract of land to Miguel de las Vega y Coca on December 16, 1730, for one hundred pesos described as one half of a grant he received west of the Pueblo of Santo

Domingo. (Affidavit of John O. Baxter, Respondent's App. 2-4). The Raels contended this could only be the Gallegos grant which he received less than one year before, since that was the only grant Gallegos allegedly received in the area.

3. No evidence was introduced by the Pueblo when Diego Gallegos actually died. Jenkins did not have original documentation of Diego Gallegos's alleged marriage to Josefa Maria Gutierrez, who purported by made the conveyance to the Pueblo in 1748 as Gallegos' widow.

4. There are many question whether Gallegos complied with many requirements of Spanish law concerning issuance of a Spanish land grant. Jenkins admits that the "Recopilacion de las Reynos de las Indias" and other Spanish legal codes applied to New Mexico during the 1700's. The Recopilacion at the time of making the Gallegos grant required confirmation by the Spanish King. A requirement existed that a land grantee had to live on the land for four years, after which the *alcalde* of that area was supposed to submit a report testifying that the condition of continuous possession had been met and final title papers would be issued. Jenkins acknowledged that Diego Gallegos seems not to have actually lived on his grant, but he continued to try to acquire other land in the Keres region. Many of the various requirements of Spanish law concerning issuance of grants were never followed by any of the Spanish grants in New Mexico, and none can be considered as "perfect" title. (Jenkins Dep at 48-52, Respondent's App 5-11). Also, the descent laws of Spain at the time the Gallegos grant are involved concerning his alleged widow's sale of the grant to the Pueblo, since they had several children. These questions the Raels argued would necessitate an investigation by a historical Spanish legal expert, which Jenkins admits she was not. (Jenkins Dep at 48, Respondent's App 7).

5. The Raels contended that the defenses of abandonment and extinguishment applied to the Gallegos grant claim, which the lower court refused to consider in its ruling on the motion for summary judgment.

6. The Spanish land grants to the various sixteen Pueblos in New Mexico, which were confirmed by the United States through the office of Surveyor General from 1848 to 1860, were normally one square league, while the Pueblo of Santo Domingo received an

area in excess of one square league which generally comports with one half of the area claimed by the Pueblo to be the Gallegos grant. (Baxter Affidavit, Appendix B, Respondent's App 1-3). He states that the Gallegos conveyance to Vega y Coca in 1730 was also a record with the Office of the Surveyor General when it considered the Pueblo's application containing the Gallegos grant. Since the only reason given by Earl Ortiz, the Pueblo's surveyor, for this excess land, which amounts to approximately 25,000 acres, was that it was a surveying mistake, Baxter gave his opinion that the Gallegos Grant claim was considered by the Office of Surveyor General when the Pueblo's lands were surveyed, and that they were given the equivalent of one half of the Gallegos grant, which is all the widow could have conveyed to the Pueblo given the Vega y Coca deed. He stated that "In my opinion, the Pueblo of Santo Domingo's claim to the Gallegos grant has already been acted upon favorably by the Office of Surveyor General and Congress." *Supra* at Respondent's App. 3.

The Raels submit that these factual contentions were well supported in the evidence, and created issues of material fact concerning the validity of the Pueblo's claim to the Gallegos grant, and that therefore, the lower court's ruling granting partial summary judgment was properly reversed by the 10th Circuit Court of Appeals.

III. THE LOWER COURT LACKS JURISDICTION OVER THIS ACTION

A. *Extinguishment*

The Raels submit that any and all land claims, no matter what their nature and source, of the Pueblo of Santo Domingo to the Rael tracts have been extinguished by the United States. Though the Pueblo has contested that an extinguishment has occurred, there has been a final determination concerning the extinguishment of the Pueblos's claim to this area, whether based on aboriginal possession or the alleged purchase of the alleged Gallegos Grant.

The judicial determination of all issues of extinguishment of claims of the Pueblo resulted from the special court established for the specific purpose of determining the extinguishment issue and the right of compensability from the United States government for loss of property rights. In 1946, Congress established the Indian

Claims Commission to hear and resolve Indian claims against the federal government. *See generally,* Act of August 13, 1946, Ch. 958, 60 Stat. 1049 (codified as amended at 25 U.S.C. Sections 70(a) to 70(v-3). For over a decade, Congress pondered proposals for alleviating the problem of judicial unavailability to resolve longstanding Indian claims, finally producing the Commission:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity including those sounding in tort, with respect to which the claimant would have been entitled to sue in a Court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a Court of equity; (4) claims arising from the taking by the United States, whether as a result of treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70(a).

The Commission was authorized to handle those tribal claims filed before August 13, 1951, that had accrued prior to enactment of the statute. 25 U.S.C. Section 70(k). Since both the Pueblo's aboriginal possession claim and the Gallegos grant claim accrued prior to 1946, and the language of Section 70(a) clearly encompasses both types of claims, the commission had full jurisdiction over them. The Pueblo was informed of the provisions of the legislation; an Investigative Division was responsible for making a "complete and through search for all evidence affecting each claim," 25 U.S.C. Section 70L(b); and a revolving fund was established for loans to pay expert witnesses. 25 U.S.C. Sections 70N(1-7). The Pueblo admitted that in 1937 they had turned over the original

Gallegos Grant papers to the Bureau of Indian Affairs for translation, and the Translation Bureau of the State Department made translations. During the time the Raels were completing their requirements to obtain homestead patents, the Pueblo was fully aware of the proported Gallegos Grant, yet made no protest to the Rael applications.

The Congressional purpose in enacting the Indian Claims Commission Act was to provide an exclusive and final remedy for Indian tribal claims based upon the deprivation of title, whatever its source, or the possession of lands, which accrued prior to 1946. *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (9th Cir. 1981), cert. denied 455 U.S. 907 (1982).

In *Pueblo of San Ildefonso et. al v. United States*, 30 Ind. Cl. Comm. 234 (1973), the reported decision over the Pueblo's claims before the commission, the Court stated:

> "Each plaintiff formerly enjoyed use and occupancy under aboriginal title to a larger area including but extending well beyond its present land holdings. Parts of these larger areas were granted to third parties by the Spanish or Mexican governments. Other parts were taken from the Plaintiffs by the United States. It is these latter parts which we are concerned with here." *Supra.* at 235.

Since the Raels received patents from the United States, the lands herein of concern were clearly within the jurisdiction of the commission. The Pueblo hired counsel to represent it before the Commission, Darwin P. Kingsley, Jr. of New York City. The Pueblo, with assistance of counsel, free experts, the Bureau of Indian Affairs and the Commission itself, described the areas for which it wanted compensation based on any claims, and there appears in the reported decision to be no factual controversy as to the size of the Pueblo's land claims.

The United States and the Pueblo *stipulated* that the United States was liable for uncompensated extinguishment of these land claims, which included a stipulation that an extinguishment had occurred. *Supra.* at 235-6. The Pueblo and the United States stipulated that three methods were used in the taking of these lands: (1) conveyances under public land laws to various grantees at different times; (2) inclusion in the Jemez Forest Reserve; and (3) inclusion in the New Mexico Grazing District No. 1 created under

the Taylor Grazing Act. Santo Domingo contended that the date of taking regarding extinguishment was 1905 for the Jemez Forest Reserve; 1941 for the Taylor Grazing District; and the date of conveyance of lands patented under public land laws. The United States argued that the date of taking was 1858 by Act of Congress confirming Report of the Surveyor General of New Mexico on the validity of Santo Domingo's claims before that office (which included a claim based on the Gallegos Grant), or 1905, since by that time entries and claims of rights by nonIndians under public land laws within the claimed area had become so numerous. Supra at 237. The only issue was the date of valuation, since the extinguishment was agreed upon. The stipulations between the United States and the Pueblo were included in the reported decision. *Supra.* at 259-71. The commissions' "Interlocutory Order" concerning Santo Domingo's case stated in part:

> "1. The Plaintiff has the right and capacity to assert its claim herein.
>
> 2. At the time American sovereignty attached to New Mexico, pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the Plaintiff had aboriginal title to the tract of land described under its name in the commission's finding fact '2.'
>
> 3. The United States, without payment of any compensation, on various dates, extinguished the aboriginal title to various parcels within the aforesaid tract by patenting said parcel to third parties. For such parcels the date of taking is date of entry in the case of non-mineral claims and entries.
>
> 4. On October 12, 1905, the United States without payment of any compensation extinguished the aboriginal title of the Plaintiff to the parcels described in the commission's findings of fact '4.'" *Supra.* at 284.

As has previously been indicated, the Pueblo did not appeal any of the factual or legal conclusions of the Commission. See *United States v. Pueblo of San Ildefonso, et. al,* 513 F.2d 1383 (1975). Santo Domingo never contested that an extinguishment had occurred, and the United States Court of Claims held that "Since the commission's findings are supported by substantial evidence, and since its decision is free from errors of law, the interlocutory orders and determinations appealed from must be, and hereby are

affirmed." *Supra.* at 1396.

As previously discussed, the Pueblo attempted to reopen the case and set aside the Stipulations between the United States and the Pueblo over extinguishment, alleging unauthorized acts by its previous attorneys. All motions to reopen the case and set aside any of the final findings of the commission, specifically concerning extinguishment, were denied, and the conclusions of the commission were held final. *Pueblo of Santo Domingo v. United States,* 227 Ct. Cl. 256, 647 F.2d 1087 (1981), cert. denied, 456 U.S. 1006 (1981).

The Pueblo of Santo Domingo is precluded from relitigating the issue of extinguishment and final resolution of all claims to land, including the Gallegos Grant, because that was the exclusive province of the Indian Claims Commission. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971); Parlane Hosiery co. Inc. v. Shore, 439 U.S. 322 (1979); Restatement (Second) of Judgments, Sections 27 and 29 (1982).

Congress has the power to divest Indians of land to which their title has been recognized, subject to its obligation to pay just compensation for such a taking. *United States v. Sioux Nation,* 448 U.S. 371, 410-11 (1980). The Pueblo of Santo Domingo has repeatedly been given the opportunity to have their claim to the Gallegos Grant confirmed. They submitted their Gallegos Grant claim to the Office of Surveyor-General, which was created by Congress in 1854 to ascertain the origin, nature, character and extent of all claims to lands under the laws of Spain and Mexico. Congress confirmed the Pueblo's application, and instructed the Surveyor General to survery the lands for conveyance. Ultimately 74,753.11 acres were surveyed and approved on October 19, 1860.

Congress again sought to clear land claims based on Spanish and Mexican law in New Mexico by creation of the Court of Private Land Claims, 26 Stat. 854 (1891). Again, the Pueblo, represented by counsel, filed an application for approval of the Gallegos Grant.

Any land grant claim not file within two years of the creation of the Court of Private Land Claims was barred. 26 Stat. 854 (1891), Sec. 12. The lower court held that:

> "Persons claiming land under title perfected prior to accession by the United States could obtain court confirmation of their titles. They were not required to do

> so. The validity of titles not adjudicated by the Court of Private Land claims can be litigated elsewhere" (Doc. No. 33, "Memorandum Opinion and Order" filed 8/20/86, Petitioner's App. 39)

The Raels submit that the lower court's decision that the statutory bar in the enabling legislation for the Court of Private Land Claims was not an extinguishment by Congress can only be reached if the Gallegos Grant claim was "complete and perfect" in 1848, and that the Pueblo had failed to make a sufficient showing of a complete and perfect title under Spanish land grant laws. Further, the act creating the Court of Private Land Claims specifically held that:

> "If in any case it shall appear that the lands or any parts thereof decreed to any Claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid..." 26 Stat. 854 (1891), Sec. 14.

The Raels argue that an extinguishment of the Gallegos Grant claim and the Pueblo's aboriginal possession claim occurred by the Act of Congress confirming the Pueblo's petition before the Office of Surveyor General; that the Act of Congress creating the Court of Private Land claims, with its statute of limitations, also extinguished the Pueblo's Gallegos Grant claim; that the patents which the Raels received under the Homestead laws were also an extinguishment of the Pueblo's land claims; that the Act of Congress creating the Indian Claims Commission also was a congressional extinguishment of land claims for which Indian tribes sought compensation from the United States; and finally, that the stipulation of extinguishment in the Pueblo's Indian Claims Commission case was a final judgment of extinguishment according to the terms of the stipulation.

Other sovereign acts of the United States, besides specific acts of Congress, have been ruled to be acts of extinguishment of Indian land claims. See *United States v. Creek Nation*, 295 U.S. 103 (1934); *Confederate Salish and Kootenai Tribes v. United States*, 229 U.S. 476 (1937); *The Tlingit and Aida Indians v. United States*, 147 Ct. cl. 315 (1954); *Pueblo of San Ildefonso v. United States*, 30 Ind. Cl. Com. 234 (1973). For example, the Executive Proclamation of President Theodore Rossevelt dated October 12, 1905,

of the Gallegos grant, ie. whether the Rael tracts were within those boundaries. This ruling in effect removed the defense of the abandonment for the Raels, since the previous ruling of the court disallowed use to the Gallegos Grant claim.

Aboriginal title claims by Indians based solely on allegations that a tribe to some extent used, or occupied, lands in aboriginal status does not alone establish any rights to occupancy, or title. As the Ninth Circuit Court of Appeals in Wakiakum Bank of Chinook Indians v. Bateman, 655 F.2d 176 (9th cir. 1981) stated:

> "Whether or not an aboriginal right exists would be a question of fact to establish continuous exercise of the right ...." *Supra.* at 659.

There is no allegation in the Complaint that the lands of the Raels are contiguous to the Pueblo; or that the Pueblo has ever interfered with the title or possession of the Raels to these tracts. There is no evidence in the record that the Pueblo has continuously occupied, and extensively used, these Rael tracts after the United States became sovereign over New Mexico in 1848.

Unrecognized aboriginal title claims are dependent upon proof of actual, continuous and exclusive possession, and a proof of voluntary abandonment of an area by a tribe constitutes a defense to a land claim. *Williams v. City of Chicago,* 242 U.S. 434 (1917); *Buttz v. Northern Pac. R.R.,* 119 U.S. 55 (1886); *Shore v. Sell Petro. Corp.,* 60 F.2d 1 (10th Cir.), aff'd 55 F2d 696 (D. Kan. 1931), cert. denied, 287 U.S. 656 (1932); *see also, Mashpee Tribe v. New Seabury Corp.,* 592 F. 2d. 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (Wherein the Court sustained a jury verdict that a tribe had voluntarily abandoned its tribal status).

Aboriginal title, being only a permissive right of occupancy granted by a sovereign, must be *recognized* by the sovereign, otherwise no claim can judicially cognizable, much less support a claim for compensation. *Tee-Hit-Ton-Indians v. United States,* 348 U.S. 272 (1954); *Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. (1945).

The Pueblo contends that the lands which it received by Act of Congress from the report of the Office of Surveyor General in 1859, 11 Stat. 374 (1859), were only approved on the basis of the Spanish Pueblo land grant given to the Pueblo of Santo Domingo by Governor Cruzate purportedly in 1689. However, the Pueblo

contends that the Cruzate grant was the only basis for the award of almost 75,000 acres of land through the Office of the Surveyor General, approximately 25,000 acres in excess of one square league. Their land claims to the Office of the Surveyor General were based on what lands the tribe had received during the over two hundred year sovereignty under Spain. These claims are not reservations created by Congress, and are not based on concepts of aboriginal status determinations by the United States. Yet the lower court ruled that the defense of abandonment does not apply to claims based on alleged rights created under another sovereignty. This history of Spanish, Mexican and American sovereignty, and the creation of differing land rights under different land laws, is a factor to the determination whether or not the defense of abandonment apply to the Pueblo's Gallegos Grant claim. Though the defense has only typically been used regarding aboriginal claims presented to the United States by an Indian tribe, when those aboriginal possession claims have already been submitted to, and adjudicated by, a prior sovereignty, the abandonment issue takes on another light. The Pueblo abandoned aboriginal possession, claims, and any unresolved issues concerning the Gallegos grant by its acceptance of the survey by the office of Surveyor General in 1860.

The Pueblo argues that the Gallegos Grant was not considered by Congress or the Office of the Surveyor General in 1859, however, it never presented evidence that the Pueblo protested to anyone that the Gallegos Grant claim had not been properly handled. This would be evidence of abandonment. The Pueblo did include the Gallegos Grant claim to the Court of Private Land Claims in its first petition, however, it was withdrawn from its amended petition. This would be evidence of abandonment.

The United States made another effort to "quiet the lands within the Pueblo Indian land grants" by enacting the Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636; *see generally, New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). The Gallegos Grant claim was never raised before the Pueblo Lands Board by the Pueblo of Santo Domingo, but it did receive from Congress compensation in excess of that recommended by the Land's Board. (Act of May 31, 1933, 48 Stat. 108). The Pueblo did not object to Congress, or the President, about infringement with its Gallegos Grant claim when the Santa Fe

National Forest was created, nor when the Taylor Grazing Act was passed. The Pueblo did not protest the homestead patents to the Raels, nor their titled possession on the land for over fifty years. The Pueblo never used the Gallegos Grant claim in its case before the Indian Claims Commission. The Pueblo has been represented by counsel, free experts, federal agencies, and a long series of different legal counsel, yet the first actual presentation of the Pueblo's Gallegos Grant claim to full adjudication was when it decided to back out of their agreed upon purchase of two of the Rael tracts for $578,000, and instead sue only the Raels, not all the other Pueblos, state and federal agencies, and other private landowners within the alleged boundaries of the Gallegos Grant.

Not only is the Pueblo's history of not seeking confirmation of the Gallegos Grant claim from 1848 to the filing of this case evidence of abandonment of the claim, its petition to the Indian Claims Commission for money damages for loss of the Rael Tracts is clearly evidence of abandonment.

C. COLLATERAL ESTOPPEL AND JUDICIAL ESTOPPEL

Section 70(k) of the Indian Claims Commission Act requires that:

> "The commission shall receive claims for period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted *to any Court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.*" (Emphasis added)

This language of the Indian Claims Commission Act, and other sections thereof, preclude the filing of the present action. *See, Tewa Tesuque v. Morton,* 360 F. Supp. 452 (D.N.M. 1973), aff'd 498 F.2d 240 (10th cir. 1974); *Raypath Inc. v. City of Anchorage,* 544 F.2d 1019 (9th Cir. 1977); *Navajo Tribe v. State of New Mexico,* supra.

Longstanding reliance on Executive acts, and on the effects of Congressional acts, creating thousands of public and private land and water rights, cannot be set aside. *United States v. Texas,* 162 U.S. 1 (1896); *Stone v. United States,* 60 U.S. (2 Wall.) 525 (1865).

The Pueblo of Santo Domingo is also barred under the

principles of judicial estoppel, since a final determination in a non-appealable judgment exists that the Pueblo's claims to the Rael tracts have been extinguished. Judicial estoppel prohibits litigants from mocking final judicial decisions, protecting the integrity of the judicial process. "The doctrine of judicial estoppel precludes a party from advocating a position inconsistent with one previously taken with respect to the same facts in an earlier litigation...." *Himel v. Continental Illinois Nat'l Bank and Trust Co.*, 596 F.2d 205, at 210 (7th Cir. 1979); *United Virginia Bank/Seaboard Nat'l v. B.F. Saul Rael Estate Inv. Trust*, 641 F.2d 185, 188-90 (4th Cir. 1981)

The doctrines of collateral estoppel and re judicata apply to the position that the Pueblo has taken in the instant case. *Donovan v. United States Postal Service*, 530 F. Supp. 894, 902 (D.D.C. 1981). As Judge Friendly stated in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2nd Cir. 1961), cert. denied, 368 U.S. 986 (1962):

> "Whether a judgment, not final in the sense of 28 U.S.C. Sec. 1291, ought nevertheless be considered 'final' in the sense of precluding litigation on the same issues, turns upon such factors as the nature of the decision (ie. that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in context here relevant means little more than the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be relitigated again."

See also, United States ex rel. DiGiangiemo v. Regan, 528 F.2d 1262, 1265 (2nd cir 1975), cert. denied, 426 U.S. 950, 96 S.Ct. 3172, 49 L.Ed. 2d 1187 (1976); *Dyndul v. Dyndul*, 620 F.2d 409, 411-12 (3rd Cir. 1980); *Miller Brewing Co. v. Schiltz Brewing Co.*, 605 F.2d 990, 991 (7th Cir. 1979); *Pye v. Georgia Dept. of Transportation*, 513 F.2d 290, 292 (5th Cir. 1975); Restatement (Second) Judgments, Section 41.

As the 4th Circuit noted: "[The] judicial process should not be lent to this plain example of intentional self-contradiction ... as a means of obtaining unfair advantage." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167-8 (4th Cir. 1982).

D. ELECTION OF REMEDIES

The lower court's reasoning that the defense of election of remedies does not bar the instant case was as follows:

> "It is the defendants' contention that plaintiffs should be precluded from establishing title in this court and then recovering damages for extinguishment in the Court of Claims. Regardless of the merits of defendants' position, the record before this court indicates that defendants' motion is prematurely made. At this time, plaintiff would appear to be making a good faith effort to exclude the Diego Gallegos Grant from the stipulation. If successful, defendants' motion will be moot." (Doc. No. 137, Memorandum Opinion and Order filed 5/16/86, Petitioner's App. 26).

In the case where the Pueblo attempted to reopen the ICC case based on an argument that its counsel made unauthorized acts, a final decision ruled that the stipulation entered between the United States and the Pueblo could not be reopened.

The doctrine of Election of Remedies, Roman in origin, is but an application of the maxims that "he who seeks equity must do equity." *Peters v. Bain*, 133 U.S. 670, 33 L. Ed. 696, 10 S.Ct. 354 (1890). The doctrine has been frequently regarded as an application of the law of estoppel, and has prevented a party in the assertion or prosecution of his rights to maintain inconsistent positions, and where there is by law or by contract a choice between two remedies, which proceed upon opposite and irreconcilable claims or rights, the one must exclude and bar the prosecution of the other. 25 Am. Jur. 2d "Election of Remedies," Section 2, p. 648.

The doctrine has been viewed in terms of estoppel, the law of waiver, *Peterson v. Lott*, 200 Ga. 390, 37 S.E. 2d 358, and as a rule of procedure or judicial administration. *Berger v. State Farm Mut. Ins. Co.*, 291 F. 2d 666 (19th Cir. Kan.).

Various courts have held the doctrine to be objectionable, especially where it can serve as an instrument of injustice and oppression, as where the unsuccessful invocation of a remedy is held to bar the subsequent enforcement of another remedy. *Smith v. Kirkpatrick*, 305 N.Y. 66, 111 N.E. 2d 209, reh. denied, 305 N.Y. 926, 114 N.E. 2d 477.

Such type of criticism is not applicable to the instant case. In fact, double recovery is possible, and unless the court applies the

doctrine to the instant case, the result will amount to an injustice and oppression, not only to the Raels, but the other landowners in a similar situation to the Pueblo. Among the factors the courts have considered include long delay on the part of the litigant in invoking the remedies at his disposal, *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1923); whether double compensation of plaintiff is threatened; whether the defendant has actually been misled by plaintiff's conduct; and whether res judicata can be applied. National Lock Co. v. Hogland 101 F.2d 576 (7th Cir Ill.).

Out of the primary concerns in applying the doctrine to the case at hand is whether the Pueblo has made a decisive choice of one remedy which precludes the availability of a conflicting remedy. As the Raels have previously argued, the Pueblo has made a final decisive election of remedy by allowing a final judgment of extinguishment and entitlement to damage before the Indian Claims Commission to occur.

The application of the doctrine of election of remedies to cases involving claims to real property have been numerous. *See United States v. Oregon Lumber Co.*, supra.; *Hoskins v. Smith*, 133 Wash. 90, 233 P. 279; *Frederickson v. Nye*, 110 Ohio 459, 144 N.E. 299, 35 A.L.R. 1163; *Christmen v. Rinehart*, 46 Idaho 701, 270 P. 1059.

The Raels request this court to hold applicable the doctrine of election of remedies in this cause, since the Pueblo has made a prior, final, conclusive and irrevocable election, and that such constitutes an absolute bar to the present action.

The Indian Claims Commission Act clearly contains language that bars Indian Tribes from litigating matters already adjudicated before the commission. The relevant provision state:

> "The payment of any claim, after its determination in accordance with this act shall be a full discharge of the United States of *all claims and demands touching any of the matters involved in the controversy.*" (Emphasis added) 25 U.S.C. Section 70(u).

The legislative history of the Act clearly shows an intention to create a complete bar to further proceedings arising out of the same subject matter. The House Indian Affairs committee succinctly stated the reason behind the provision: "This is necessary if the Commission is to fulfill its function of winding up *all outstanding Tribal Claims.*" (Emphasis added) R. Barker and A. Ehhreufeld,

Legislative History of the Indian Claims Commission Act of 1946, 148 (1946); *see also*, H.R. Rep. No. 1466, 79th cong., 2nd. Sess., represented in United States Code Cong. and Ad. News 1347; S. Rep. No. 310, 78th Cong. 2d Sess. (1944); H.Rep. No. 291, 78th cong. 2nd Sess. (1944); [1944] Sec. Int. Ann. Rep. 252; S. Rep. No. 1715, 79th cong. 2nd Sess. (1946).

The entire purpose behind the Act was to finally resolve Indian land claims, no matter the type of claim. The Pueblo of Santo Domingo had presented its various claims to the Office of Surveyor General, the Court of Private Land Claims, and the Pueblo Lands Board, over a period of almost a century, and the legislative history of the ICC act clearly indicates that any outstanding land claims against the United States had to be presented to the Commission. The history of the Pueblo's case before the commission shows that the Pueblo itself sought to resolve all its outstanding claims. From the filing of its petition before the Commission in August 1951 to the present date there has been a continuous effort by both the Pueblo and the United States to finally compensate the Pueblo for lands claims it lost throughout its history under United States sovereignty. As previously argued, there has been a final determination of what lands were lost, and the method of valuation of the compensation which it is to receive. However, during the past two decades, the Pueblo has in essence sought to avoid payment simply because the valuation of damages was not sufficient. The Pueblo under its new attorneys had endeavored to avoid the statutory bar in the ICC act by bringing a series of law suits against private land owners whose property is within the areas already dealt with by the Commission, while avoiding the United States as a defendant. This clearly frustrates the legislative purpose behind the act. The inequity of the situation, and the violation of the legislative purpose behind the act, is starkly displayed when the Pueblo sues private property owners whose title derives from the United States, like the Raels. The Raels' patents should afford them the same legal position which the United States would have under these circumstances.

President Franklin D. Roosevelt, when he issued patents to the Raels' predecessors in title under the Homestead Act of May 20, 1862, created the "strongest of presumptions" that he exercised not only his powers, but also those delegated by Congress, and the widest latitude of judicial interpretation should be in favor of the

Raels, and against the Pueblo, who bears the burden of persuasion that the President's acts were not authorized. *Dames and Moore v. Regan*, 453 U.;S. 654 (1981); *see also, United States v. Chemical Foundation*, 272 U.S. 1 (1926); *Denby v. Berry*, 263 U.S. 29 (1923); *Dakota Central Telegraph Co. v. South Dakota*, 250 U.S. 163 (1919).

CONCLUSION

The Raels respectfully submit that the Petition for Writ of Certiorari be denied, with instructions that the lower court should dismiss this action for lack of jurisdiction.

Respectfully submitted this 2nd day of July 1990.

Chris Lucero, Jr.
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(505) 843-6687

APPENDIX INDEX

APPENDIX B

(April 23, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTO DOMINGO, and the UNITED STATES OF AMERICA ex rel, PUEBLO OF SANTO DOMINGO, Plaintiffs,	)	
v.	)	No. 83-1888 HB
ARNOLD J. RAEL, et al., Defendants.	)	

AFFIDAVIT OF JOHN O. BAXTER

COMES NOW JOHN O. BAXTER, and being duly sworn and under oath, hereby states:

1. That he is an historical expert witness retained by the Defendants for purposes of this litigation, and on October 24, 1985, had his deposition taken by Richard Hughes, counsel of the Plaintiff Pueblo of Santo Domingo.

2. After his deposition was taken, he was instructed by counsel for the defendants to investigate more fully the records and proceedings of the Pueblo of Santo Domingo's case before the Office of Surveyor General, and concerning any historical claims made by other pueblos to the archeological site which has been referred to as L.A. 85, as being an ancestral home.

3. I read R. Benedict, Tales of Cochiti Indians (Original Ed. 1931). Benedict interviewed several elderly Cochiti Indians in the 1920's concerning their oral history. The material contained in this work conflicts with the oral history recently given by several Indians from Santo Domingo to experts hired by the Plaintiff that L.A. 85 was exclusively their Pueblo's ancestral home. Oral histories given to Benedict indicate that the people of Cochiti, Santo

Domingo, San Felipe, Acoma, Laguna, and Sia all lived together at "Shipap," speaking the same language and living as brothers. Trouble forced their separation and the Pueblo of Santo Domingo resettled on the east bank of the Rio Grande at Cactus Village, five miles from present Cochiti. The Pueblo of Cochiti resettled at the old Pueblo of San Miguel, seven or eight miles north of present Cochiti. The people of San Felipe, Laguna, and Acoma followed down the Peralta Canyon toward the West and built the ruined pueblo of Peralta Canyon. This oral history obtained by Benedict indicates that L.A. 85 can be considered the ancestral home of the Cociti, and of the other Keres speaking pueblos.

4. The records concerning the Pueblo of Santo Domingo's case before the Office of Surveyor General clearly indicates that the Pueblo included in their application their claim to the Gallegos Grant. There is noting in the records of the Office of Surveyor General, or in the records of the congressional acts approving the Pueblo of Santo Domingo's application, that their claim to the Gallegos grant was allowed or disallowed.

5. The Spanish grants confirmed by congress to the various Pueblos were normally one square league in size. The grant confirmed by Congress to the Pueblo of Santo Domingo was one square league, and an additional large tract which appears to be almost one half the area the Pueblo of Santo Domingo how claims is the Gallegos Grant.

6. Earl Ortiz, the surveyor working for the Pueblos of Santo Domingo in this litigation, testified that this large area granted to the Pueblo by the Office Surveyor General and Congress, in excess of the normal one square league, was a surveying mistake, since 'that's the only explanation I can come up with, is that somebody fouled up.' See Deposition of Earl Ortiz, p. 49-50.

7. Within one year of Diego Gallegos receiving the grant herein of concern, on December 16, 1730, he conveyed to Miguel de la Vega y Coca for one hundred pesos one half of a tract west of the Pueblo of Santo Domingo, describing the property as "a piece of farming and also uncultivated lands on the other bank of the Rio del Norte which he held by grant which the King, our lord, made to him, and they are between Santo Domingo and Jemez and have the name San Miguel de la Cruz." See SANM, no. 1037. Gallegos had no other grant to convey in this area except the one herein of

concern. This granting document from Gallegos to Miguel de la Vega y Coca was available to the Office of Surveyor General during his deliberation concerning the application of the Pueblo of Santo Domingo, and presumably he was aware of it.

8. Through the records of the Office of Surveyor General and congressional records concerning the Pueblo of Santo Domingo's claim do not explicitly refer to what disposition was made concerning the Pueblo's Gallegos Grant claim, the large area granted to the Pueblo in excess of the standard one square league is too large with dimensions drastically different than one square league to be considered simply a surveying error.

9. In my opinion, the area granted in excess of one square league, clearly comporting to one half of the area now claimed to be the Gallegos Grant, indicates that the office of Surveyor General and congress acted favorably on the Pueblo's claim to the Gallegos Grant, and that the Gallegos-Miguel de la Vega y Coca deed was considered.

10. This opinion is partially based on the irrationality of such a large area being simply a surveying error, and on the excess area clearly being about one half of the area now claimed to be the Gallegos Grant. This would also explain why the Pueblo of Santo Domingo ultimately withdrew their application to the Gallegos Grant before the Court of Private Land Claims.

11. In my opinion the Pueblo of Santo Domingo's claim to the Gallegos grant has already been acted upon favorably by the Office of Surveyor General and Congress.

/s/ John O. Baxter

Subscribed to and sworn before me this the 18th day of April 1986.

Notary Public

My commission expires:
October 20, 1990

APPENDIX C

EXCERPTS FROM
DEPOSITION OF Myra Ellen Jenkins
(Taken July 6, 1985)

Q. I see. Was there any indication of how Diego Gallegos was claiming this land that he was given half interest?

A. He claimed it by a grant.

Q. Was there a grant?

A. There is no record of such a grant, no.

Q. I see. So Diego Gallegos was given title to something he didn't own, apparently?

A. That document is highly suspect, for one thing. Miguel Thenorio de Alba was alcalde mayor of Taos and Picuris as the time this grant was supposed to have been made.

Q. And that is where it's supposed to have been made?

A. No. It appears in the archives, this purported conveyance, or I don't know its purport, but I think if he conveyed, it's something to which there is no record that he had any right.

Q. I see. What about these petitions for grants?

A. They were all disallowed.

Q. Okay. Did you find any historical records of Diego Gallegos' death?

A. I looked in the burial records,it should have been either in Santo Domingo or Cochiti, I think, and couldn't find a record of his death, but he had by 1748, when the widow conveys, but I couldn't find a record of his death, no.

Q. Okay. Did you find a record of his marriage?

A. No, I didn't. It's Maria Josefa Gutierrez. Some of the church records are also fragmentary, and I looked, but I didn't find. Now, I may not have looked earlier or late enough , wait a minute, yes, yes, yes, there is a record of his marriage, he marries her in Bernalillo, Maria Josefa Gutierrez.

Q. How did you track that down?

A. I accepted Fray Angelico Chavez' "Origins of New Mexico Families." He takes that material entirely from the church archives, but I did look for the death of Gallegos and couldn't find it.

Q. And he refers to Diego Gallegos in that book?

A. Yes, he does. He says a funny thing in it, of course, he is truncating his information that his wife and children later sold land to Santo Domingo, I think—you don't happen to have a copy, but it does make a very brief statement of the sale of land, I don't know that he said to Santo domingo. But he statement concerning her, but apparently he doesn't have the death—he didn't find the death of Gallegos, either, but he is dead by—

Q. Why would this Maria Josefa Gutierrez still maintain her, I assume, maiden name?

A. They always do, a Spanish woman, clear up until about the turn of the century, always carries her maiden name, she is buried under it, and so on. She didn't even add the "de" until after U.S. occupation, so always, that is one of the kind of confusing things sometimes, and yet, it's one of the very things by which you can trace genealogy, in many instances, is the fact that they always carry their maiden names.

Q. Doesn't she also assume the name of her husband?

A. No, she is buried under her own name, it would say 'Esposa de,' but she never takes her husband's name, women's lib, Spanish style.

Q. Did you find any other documents concerning Maria Josefa Gutierrez?

A. No, I didn't, and I couldn't find any record of her death, nor could I find who the children are in the baptismal entries.

Q. Now, are you an expert on Spanish law?

A. No, I am simply an amateur. No, as it is interpreted. I have no legal training.

Q. would you give an expert witness interpretation concerning Spanish law?

A. I would quote the law. If I had some knowledge as to where to find it interpreted, s (sic) to how the authorities interpreted it.

Q. I see. So your function was basically an archival search function?

A. An historian.

Q. Yes. Are you familiar with the various concepts of property law under the old Spanish—

A. What the concepts are, yes.

Q. Are you familiar with Las Siete Partidas?

A. Yes. Well, that is a law code of Alfonso, The Wise, yes.

Q. Are you familiar with the recopilacion?

A. Very, very.

Q. Okay. And the recopilacion de las Indias?

A. Recopilacion de las Reynos de las Indias, commonly known as the recoup, yes.

Q. That was a collection of Spanish laws concerning the new world?

A. Yes, that is the codification in 1680, yes.

Q. In there, they have a lot of provisions concerning land grants in the new world?

A. Yes, there is one whole book, as a matter of fact, on land, yes, and there is also one whole book on Indian law and Indian rights.

Q. Now, were there provisions on the—well, concerning Spanish land grants in New Mexico?

A. Not in recopilacion on the—well, concerning Spanish land grants in New Mexico?

Q. Well, to your understanding, did the recopilacion apply to New Mexico land grants?

A. Yes. Well, it applied. As I understand now, of coarse, you have that one section that I told you about, about the governor making the land grants, but certainly the whole system is outlined in the recopilacion concerning the making of grants in Mexico, and of making all kinds of grants. Now, the trouble is with New Mexico, and you get up to the frontier, things don't quite just fit the pattern, so of course, you have to adapt them so you don't find New Mexico land grants specifically fitting that pattern.

Q. In other words, some Spanish land grants do not comply with the provisions of the recopilacion?

A. It isn't a matter of they don't comply, as I interpret it, it's a matter that they just don't quite fit the mold. I mean, your know, the business of the four square league grant for Spanish towns, I am talking about, they don't fit that. If you are going to have a little settlement of like Las Trampas or any of the other little outlying settlements, they are extended communities along the strams, and they, of course, make use of every bit of irrigable land, so it isn't that they are not in compliance, it is that they are adapting, obviously, the laws, and then there is a new recopilacion in 1728. I think, but New Mexico does have a very different system, all right, than specifically following exactly what the recopilacion says.

Q. Have you ever found any indication in the recopilacion or in the novisimo recopilacion where the territory of New Mexico is exempted from the provision of those enactments?

A. No, no.

Q. Now, those laws concern the land grants, there were provisions in there about requirements to be met by grantees after obtaining the original grant?

A. Yes, uh-huh. Well, I am not sure what the recopilacion says specifically. I know how it was applied in New Mexico, the governor makes the grants and it goes by a regular system. There is the investigation of the petition which states that the land is realengo or it's baldios or whatever, and then to the governor, and then the governor sends the alcalde out to investigate, see if there is any third party involved or whatever, and then if everything seems to be in order and it is realengo, then the grantees are placed in possession, and then the final proceedings come back to the governor for approval.

Now, this is not always the case. In the early 1700's, essentially it is the case, basically after 1750, and then there is a provision in the private grants, by and large, in the final order of the governor, that the grantees must live on them four years before, yes, before selling or abandoning.

Now, they could sell before and they could not ask for land in anther place, normally farming land, that is, if they already had a grant, until they gave up the one grant.

Q. Have you found any documents concerning the Gallegos Grant, and whether or not these things were investigated?

A. Well, yes, it's in the grant papers, yes, it's in the approval in Exhibit Number 1, the procedure is quite clear, and it's the very normal, usual procedure.

Q. You had previously said that, in your opinion, this was a valid Spanish land grant, the Gallegos Grant?

A. Yes.

Q. And but yet, you indicated that you are not an expert on Spanish law. Are you saying that there is not question that something was given, that there was a grant known as the Gallegos Grant?

A. No, that is not what I am saying. I am saying that this is made in strict accord with the whole system of laying out a grant as it develops in New Mexico, and I don't know how many dozens of land grant cases follow the regular pattern.

Q. So it's a peculiar Spanish land grant in New Mexico?

A. Yes.

Q. As to its legality under Spanish law, you are assuming the expert witness position of saying that it is a legal, valid land grant in compliance with all Spanish law?

A. I am saying that it was accepted by the authorities as a legal grant.